IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS.

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Counsel for Petitioners.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Calvert R. 102-112, Seagram R. 96-106) is reported in 184 F. (2d) 11.

JURISDICTION

The judgment of the Court of Appeals was entered July 27, 1950 (Calvert R. 102, Seagram R. 96). A petition for rehearing filed August 10, 1950 (Calvert R. 114, Seagram R. 107) was denied September 15, 1950 (Calvert R. 122, Seagram R. 115). A petition for writs of certiorari was filed December 8, 1950 and was granted February 26, 1951. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

STATUTES INVOLVED

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, Ch. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (La. Act 13 of 1936, La. R. S. 51:391-396). These statutes are printed in Appendices A and B. pp. 59-61.

QUESTION PRESENTED

The Miller-Tydings Amendment excepts from the Sherman Act resale price maintenance by "contracts or agreements". Does this exception extend to resale price maintenance imposed on unwilling, non-contracting parties under the non-signer clause of the Louisiana Fair Trade Act?

STATEMENT OF THE CASE

The Louisiana Fair Trade Act, on which the complaints are predicated, is typical of fair trade statutes in forty-five states. It has two basic provisions. Section 1, *the contract clause*, provides that a contract shall not be invalid by reason of resale price-fixing provisions. Section 2, *the non-signer clause*, imposes resale price-fixing on non-contracting retailers.[1]

Petitioners operate a super-market in New Orleans. They sell meat, vegetables, groceries, drugs, light hardware—and alcoholic beverages in packages. By an efficient operation, a volume business on a self-service, cash-and-carry basis, and hard work by the owners themselves, petitioners are able to reduce their costs and pass on corresponding savings to their customers. Petitioners are successful in a highly competitive field.

Calvert Distillers Corporation, respondent, a Maryland corporation, is a wholly-owned subsidiary of Calvert Distilling Corporation, also a Maryland corporation (Calvert R. 3). Seagram-Distillers Corporation, respondent, a Delaware corporation, is a wholly-

[1] Only Missouri, Texas, Vermont, and the District of Columbia have not enacted fair trade laws. See 2 CCH Trade Reg. Serv. (1950) Para. 7011 *et seq.* In the forty-five states which have adopted fair trade laws, the non-signer provision appears in almost identical form. The non-signer clause of the Louisiana Fair Trade Act provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person damaged thereby." La. Act 13 of 1936, Sec. 2; R. S. 51:392.

owned subsidiary of Joseph Seagram & Sons, Inc., an Indiana corporation (Seagram R. 3). Distillers Corporation—Seagrams, Ltd., the Canadian holding company for Calvert, Seagram, Old Frankfort, and Carstairs subsidiaries, is one of four distilling companies which, according to the Federal Trade Commission, together produce about two-thirds of all distilled whiskey manufactured in the United States. *FTC Report on Resale Price Maintenance* (1945), p. 337. The whiskies are distilled in Kentucky and in other states. The distributors neither manufacture nor warehouse goods in Louisiana (Calvert R. 46, Seagram R. 39). Orders are received from Louisiana wholesalers and forwarded to St. Louis and New York for processing (Calvert R. 47, Seagram R. 35). Each distributor operates through an "exclusive" wholesaler (Seagram R. 35, Calvert R. 45) who, working closely with the distributor's representative, sells the retailers (Calvert R. 57, Seagram R. 35). Sometimes, the distributor participates in three-cornered "deals" with the wholesaler and retailer (Calvert R. 55).

Prices to Louisiana consumers are fixed not by Louisiana retailers, nor by a Louisiana wholesaler, nor even by the distributor for Louisiana. Prices are fixed by the head office of the foreign distributor's foreign parent company (Seagram R. 49, Calvert R. 44). *Someone sitting in New York or Montreal fixes the prices to be charged by Schwegmann Bros. on St. Claude Street in New Orleans or by some little country store, say at Bayou Terre Aux Boeufs* (Seagram R. 38). Prices are uniform throughout the country, ex-

cept for freight and taxes (Calvert R. 49, Seagram R. 37). A uniform contract is used (Seagram R. 42). Even the notices sent to non-contracting retailers in Louisiana were prepared in New York and mailed from Florida (Calvert R. 75). The price-fixing—the very part of the scheme that offends the Sherman Act—takes place out of the state, is made effective by an interstate transaction (the complaints alleged that title to the wholesaler passes out of the state), and is an inseparable element of an integrated, uniform, nation-wide, price-fixing program involving interstate transactions and dependent for success upon activities affecting interstate commerce.[2]

Calvert Distillers Corporation, respondent, alleged that the fair trade price for a fifth of "Calvert Reserve" is $4.24; that Schwegmann Brothers sold it for $3.35 (Calvert R. 10). Seagram-Distillers Corporation, respondent, alleged that the fair trade price for a fifth of "Seagram's 7 Crown" is $4.24; that Schwegmann Brothers sold it for $3.51 (Seagram R. 10). Respondents filed suit in the United States District Court for the Eastern District of Louisiana to enjoin petitioners from selling Calvert and Seagram products

[2] See *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 71 S. Ct. 259 (1951). The complaint states that respondent, Seagram Distillers Corp., the distributor, is specifically authorized by all of the producers in the Seagram network of corporations to enforce resale prices in Louisiana. The complaint alleges that "all such products purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce, shipments being made from and title passing at a point outside of the State of Louisiana." (Seagram R. 4.) Similar allegations are made in the Calvert complaint (Calvert R. 4). See also Paragraphs 3, 4, and 5 of Findings of Fact (Calvert R. 85, Seagram R. 81).

for less than the minimum prices fixed in fair trade contracts between respondents and certain Louisiana retailers.[3] The complaints were based on the non-signer clause (Section 2) of the Louisiana Fair Trade Act; respondents did not pretend to have any contractual relationship with petitioners, who were strangers to respondents' contracts. John Schwegmann, Jr., one of the petitioners, admitted the sales; testified that he had never signed any fair trade contract; stated that his policy was to buy cheaply, to operate economically, and to pass on savings to consumers (Calvert R. 67-68).

The District Court had no doubt as to the interstate character of the transactions involved (Calvert R. 48). The Court of Appeals was of the same opinion: ". . . the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of Congress over it as to *bring plaintiff's activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them*" (Calvert R. 104, Seagram R. 98).

The District Court granted injunctions in favor of respondents (Calvert R. 80, Seagram R. 77). Petitioners appealed[4] on the ground that the Miller-Tyd-

[3] For purposes of trial, the causes were consolidated and a stipulation entered that exhibits and testimony should be considered applicable in both causes, insofar as relevant. (Seagram R. 26, *et seq.*)

[4] The Court of Appeals consolidated the cases for briefing and argument (Calvert R. 96, Seagram R. 93) and rendered one opinion. The cases are separately docketed in this Court, but one petition was filed for writs of certiorari and one brief on the merits is filed.

ings Amendment excepts from the Sherman Act only contractual price-fixing; that non-contractual price-fixing imposed on strangers to a resale price maintenance contract is beyond the shelter of the Miller-Tydings Amendment.[5] The Court of Appeals, by a divided court, affirmed the District Court and, subsequently, refused a rehearing.

SUMMARY OF ARGUMENT

The Sherman Act prohibits price-fixing[6] in transactions affecting interstate commerce. The Miller-Tydings Amendment excepts "contracts or agreements

[5] In the District Court and in the Court of Appeals petitioners also contended that the so-called fair trade contracts in these cases are subject to potestative conditions, lack mutuality, and are invalid under Louisiana law.

[6] In this brief "resale price maintenance" is considered "price-fixing" and the terms are used interchangeably, where appropriate in the text. There has been considerable quibbling as to whether a fair trade act is a price-fixing statute; proponents of a price-fixing statute alluringly entitled "Fair Trade Act" are naturally sensitive to verbal connotations. In *Old Dearborn Dist. Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936) the Court ruled that "section [one] does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private person to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit." This language is repeatedly encountered in the legislative history of the Miller-Tydings Amendment. (See footnote 7.) The Court, however, was here discussing Section 1, the contract clause. The Court's dictum has no application to the effect of the non-signer clause, under which the price for an entire retail level, binding all the retailers in a state, may be fixed by a single contract. Moreover, in more than a third of the states, fair trade laws actually permit setting definite rather than minimum resale prices. *"Price maintenance is mere price fixing."* Schachtman, *Resale Price Maintenance*, 11 Pittsburgh L. Rev. 562, 580 (1950). Petitioners submit that non-contractual resale price maintenance is price-fixing, but, whatever it is called, it has the effect of "fixing, pegging, or stabilizing the price of a commodity [and] . . . is illegal per se", unless immunized by the Miller-Tydings Amendment. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 71 S. Ct. 259 (1951).

prescribing minimum prices for the resale of a commodity". Petitioners submit that the Amendment provides no sanctuary for resale price maintenance imposed on those who are not parties to such contracts or agreements.

(1) The Miller-Tydings Amendment simply means what it says: contractual resale price maintenance is excepted from the Sherman Act; non-contractual resale price maintenance imposed on unwilling, non-contracting parties is not excepted. *Contractual* price-fixing no more includes *non-contractual* price-fixing than "navigable" includes "non-navigable" or "negotiable" includes "non-negotiable". Such verbal license may be fitting to Humpty Dumpty. It should not be imputed to the Congress of the United States legislating on a major national policy. Congress made its meaning demonstrably evident by paralleling the contract clause of a typical fair trade act. The Miller-Tydings Amendment is identical, word for word, with Section 1, the contract clause, of a typical fair trade statute, but bears no relation whatever to Section 2, the non-signer clause. (See p. 18.) The Amendment contains no language remotely resembling the language of the non-signer clause in a fair trade act and no reference anywhere to price-fixing imposed on non-signers. Congress did not purport to declare that all resale price maintenance was excepted from the antitrust laws. Far from that, Congress limited the scope of the exception to contracts, not all contracts fixing resale prices, but certain contracts complying with specific conditions.

(2) As a general rule of statutory interpretation, a exceptions or provisos are construed strictly. Ther is especial reason for a strict construction of th Miller-Tydings Amendment. The Amendment is a exception to the Sherman Act, the statute embodyin probably the most important statement of policy i the American philosophy of a democratic competitiv economy. The Amendment carves a gaping hole i the policy of free enterprise based on competition. law so inconsistent with national policy, a statut weighed in the balance by high authority and foun wanting, should be narrowly confined to its plai meaning.

(3) The Miller-Tydings Amendment is clear and un ambiguous. Under the plain meaning canon of statutor construction, there should be no resort to legislativ history to attempt to determine if the legislature in tended a meaning different from that plainly ex pressed. In this case, resort to legislative histor *creates*, it does not resolve, an ambiguity.

(4) The legislative history of the Miller-Tydings Amendment extends from the Sixty-Third through the Seventy-Fifth Terms of Congress. The Act derives from bills born of the *Dr. Miles* case at a time when the non-signer scheme was undreamt of in the price-fixer's philosophy. The language of the act is virtually identical with S. 100 and H. R. 1611, Seventy-Fifth Congress (1937); with S. 3822, 74th Congress (1936); with the Capper-Kelly bills (1925-1933). The substance of the act is the same as the Kelly bills (1917-1925), the Stephens bill (1916),

and the Stevens bill (1914). The Capper-Kelly bills (which supplied the language of the Miller-Tydings Amendment) and the earlier bills were introduced in Congress before there was any fair trade law, much less a non-signer clause. These legislative proposals were a direct reaction to *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 S. Ct. 376 (1911), holding resale price maintenance *contracts* illegal. The early bills and the Capper-Kelly bills and the later bills were *presented to Congress* as measures designed to write into the law the dissenting opinion of Justice Holmes in the *Dr. Miles* case; to legalize only a permissive resale price maintenance contract which a manufacturer and retailer could enter into "*if they want to do so*".[7] The Capper-Kelly bill, besides furnishing the form and substance of the Miller-Tydings Amendment, also supplied the language of the first fair trade law, the California Act of 1931, termed "The Junior Capper-Kelly Bill". It contained no non-signer clause. *At the state level*, to enforce resale price maintenance against non-contracting parties, California in 1933 had to amend its Fair Trade Law by the addition of a non-signer clause; all state fair trade laws follow the California model and contain an express and separate statutory provision making price-fixing applicable to non-signers. *But at the federal level*, no corresponding provision has ever been proposed in any congressional bill. The Miller-Tydings Amendment, because it is essentially

[7] Rep. McLaughlin of Nebraska, one of the principal proponents of the Miller-Tydings Act, and a member of the House sub-committee which submitted a report on H. R. 1611, (75th Cong., 1st Sess.) said: "H. R. 1611 . . . is entirely a *permissive* act. It merely *allows* the seller and buyer . . . to contract for resale of goods according to state law, *if they want to do so*." 81 Cong. Rec. 8141 (1937). *Cf.* Justice Sutherland in the *Old Dearborn* case, 299 U. S. 183, 57 S. Ct. 139 (1936).

the Capper-Kelly bill, exactly parallels the *contract* clause of a typical fair trade law and has no reference to non-signers. A fair appraisal of the entire legislative background of the Miller-Tydings Amendment impels the conclusion that the intent of Congress "goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions *(Dr. Miles Medical Co. v. Park & Sons)* as is removed by Section 1 of the Louisiana Act now in question as to intrastate transactions".[8] Only within these narrow circumscribed limits is the Act "enabling legislation" for the states to experiment contrary to the national policy of free enterprise based on a competitive economy.

This case involves the price of a bottle of whiskey; the principle involved affects the price of food, drugs, clothing, and other necessities of life. This case resulted from the operation of an independent supermarket; the final decision will have a vital effect on the merchandising methods of thousands of independent merchants, who, by efficient management of a minimum-service business, or any other business, are able to reduce their costs and pass on corresponding savings to consumers. The decision will either stimulate or deter price-fixing by thousands of manufacturers and distributors. The decision will have an immediate and continuing effect on 140 million consumers in forty-five "fair trade" states who today are paying more for the goods they buy than they would pay for the goods in a free, competitive market. In nomal times this would be serious enough. In the present crisis, de-

[8] Dissenting opinion of Judge Russell (Calvert R. 110, Seagram R. 104).

tonated by the Korean war, perhaps the first of a long series of crises, Congress and everyone else is gravely concerned over the danger of inflation. The Miller-Tydings Act is inherently inflationary because private price-fixing under fair trade laws is inflationary.[9] The decision of the court below enlarges the scope of this dangerous exception to the Sherman Act.

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[9] Resale price maintenance is an "impediment to low-price policies." Nourse, *Price Making in a Democracy*, 161 (1944). In an article in the January issue of Fortune, 1949, *The Not-So-Fair-Trade Laws*, it was said: "[In a] study of 117 branded drug items . . . thirty-five cost about a third less in Washington than in Maryland, thirty-eight about a quarter less and twenty-nine about a seventh less". The former head of the Anti-Trust Division of the Department of Justice has stated: "So-called fair trading . . . has resulted in higher prices . . . . A bottle of Old Granddad costs $5.45 in Washington and $6.65 before state tax in Maryland." Bergson, *Current Problems in the Enforcement of the Anti-Trust Law*, Address to Bar Association of the City of New York; N. Y. Times, Feb. 18, 1949, p. 19, col. 1. "If the whole direction of resale price maintenance must be to favor the less efficient retailer and to block the use of standard techniques in aggressive and economical merchandising, then the end result must be that Fair Trade Laws raise prices on Fair Traded goods." Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 50 (1950). The Federal Trade Commission has pointed out that price increases "fell most heavily upon those consumers who from necessity or personal choice patronize minimum-service stores". *Federal Trade Commission Report on Resale Price Maintenance* (1945), XLVIII. "All the evidence available and *a priori* theorizing point indubitably to the conclusion that patrons of lower price, limited service firms are forced to pay higher prices for goods under control than previously . . . . [There was a general upward movement of prices and other factors to be considered, but] contractual prices in California in 1934 for [fair traded] products sold through drug stores were as much as 33-1/3 per cent higher than the advertised prices in newspapers during the first six months of 1933, at the bottom of the depression." Grether, *Price Control Under Fair Trade Legislation* (1939), p. 298. See also, Grether, *Experience in California with Fair Trade Legislation Restricting Price Control*, 24 Cal. L. Rev. 640 (1936). The author of a recent carefully considered article on the law and economics of resale price maintenance, concluded that the best way of determining whether the consumer gets more or less for his money under fair trade is to compare prices on identical items sold in a state under fair trade and in a state having no resale price maintenance law. He selected twenty-five items sold at drug stores in Illinois and Missouri. One-third were higher priced in the fair trade state of Illinois than the free trade state of Missouri. Not one was lower in price. On eight identical items the price was 15.6% higher in Illinois. "Under Fair Trade the consumer gets less for his money." Schachtman, *Resale Price Maintenance and Fair Trade Laws*, 11 Pitt. L. Rev. 562, 584 (1950).

ARGUMENT

I.

The Language of the Act: The Miller-Tydings Amendment Excepts from the Sherman Act only Resale Price Maintenance by Contract or Agreement; it does not Except Non-Contractual Resale Price Maintenance Imposed on Unwilling, Non-Contracting Parties.

In keeping with its importance as a statement of fundamental national policy, the Sherman Act is broad and very simply stated. Section 1 provides: "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal."

In 1911 the Court decided, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, that resale price maintenance contracts were a violation of the Sherman Act. Mr. Justice Hughes, speaking for the Court, said:

> "The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purpose. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

After the *Dr. Miles* case and prior to the Miller-Tydings Amendment, it was settled that the Sherman

Act makes it unlawful to enter into any agreement, limiting or fixing the price at which a commodity must be resold. *U. S. v. Shrader's Sons, Inc.*, 252 U. S. 85, 40 S. Ct. 251 (1920); *U. S. v. Trenton Potteries Co.*, 273 U. S. 392, 47 S. Ct. 337 (1927). Except as provided in the Miller-Tydings Amendment, price maintenance contracts violate the Sherman Act *per se*. *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436, 458, 60 S. Ct. 618, 626 (1940); *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811 (1940); *U. S. v. Univis Lens Co., Inc.*, 316 U. S. 241, 62 S. Ct. 1088 (1942); *U. S. v. Masonite Corp.*, 316 U. S. 265, 62 S. Ct. 1070 (1942); *U. S. v. Bausch & Lomb*, 321 U. S. 707, 721, 64 S. Ct. 805, 812 (1944).

Although state fair trade acts legalized resale price maintenance contracts involving *intrastate* transactions, the Sherman Act still prohibited resale price maintenance contracts involving interstate commerce. In the *Old Dearborn* case, which upheld the constitutionality of a state fair trade act, the Court took pains to point out that its opinion was restricted to the constitutionality of the Illinois Fair Trade Act. *The Court reiterated its position that "a [fair trade] agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act." Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 195, 57 S. Ct. 139, 143 (1936).

It was this language and the continuing vitality of the *Dr. Miles* case that compelled the proponents of

resale price maintenance to renew their efforts to obtain federal immunity from antitrust prosecution.

The limited congressional immunity they succeeded in obtaining, after twenty-five years of unsuccessful lobbying,[10] was the Miller-Tydings Act, amending Section 1 of the Sherman Act. The Miller-Tydings Amendment provides that nothing "contained" [in the Sherman Act] shall render illegal "contracts or agreements prescribing prices for the resale of a commodity . . . when contracts or agreements of that description are lawful as applied to intrastate transactions."

This Court has pointed out that the immunity accorded price maintenance contracts is a limited immunity accorded an individual entering into a contract.[11]

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[10] The National Association of Retail Druggists was the pressure group principally responsible for the adoption of state fair trade acts and the Miller-Tydings Amendment. For an account of its lobbying activities see Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 54-57 (1949); FTC Report on Resale Price Maintenance (1945), 64-66, 142 *et seq;* TNEC Hearings, Part 8, 3368, 3461-3463 (1939). See also *The Fair Trade Controversy*, Fortune, 75 (April, 1949): "[After publication of the article *The Not-So-Fair-Trade* Laws in the January, 1949 Fortune] . . . our net impression was that unless we changed our attitude we would be subjected to those formidable pressures that N. A. R. D. knows so well how to exert . . . Do the members of the N. A. R. D. believe in an enterprise system or not? If they do not believe in it, then we can understand why they continue to defend, by argument, by pressure, and by personal aspersion, a system of laws that is at fundamental variance with its principles." *Counsel for the National Association of Retail Druggists proposes to file a brief as Amicus Curiae in this case.*

[11] "The Miller-Tydings Amendment to the Sherman Act does not permit combinations of business men to coerce others into making such contracts . . . It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act." *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945).

The best evidence of Congressional intent is what the Amendment says—the words of the act. "The plain meaning of the words of the act covers this [case]. No single argument has more weight in statutory interpretation than this." *Browder v. U. S.*, 312 U. S. 335, 338, 61 S. Ct. 595, 601 (1941). In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944), the Court said:

> "We should of course be faithful to the meaning of a statute. But, after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another."

The Amendment says that it excepts resale price maintenance "contracts or agreements" from the Sherman Act. That is all it excepts. The statute is not couched in vague language or general words and the meaning of the words is not in dispute. In the absence therefore of any enlarging provision, there is no basis for asserting that the intent of the statute is also to except from the Sherman Act resale price maintenance imposed on unwilling, non-contracting parties. That is going beyond the bounds of the normal meaning of the words.

The limited scope of the Miller-Tydings Amendment, as manifested in the plain meaning of the words

of the Act, is conclusively proved by the close parallel between the Amendment and the contract clause of a typical fair trade act.

The Amendment is identical, word for word, with Section 1, the contract clause, of the Louisiana Fair Trade Act, a typical fair trade statute; it bears no relation whatever to Section 2, the non-signer clause. The Amendment contains no language remotely resembling the language of the non-signer clause and no reference anywhere to price-fixing imposed on non-signers.

The plain meaning of the Miller-Tydings Amendment is strikingly demonstrated by juxtaposing the Amendment with the Louisiana Fair Trade Act in parallel columns:

COMPARISON OF TYPICAL FAIR TRADE LAW AND MILLER-TYDINGS ACT

Louisiana Fair Trade Act.	Miller-Tydings Act.
(1) No contract relating to the sale or **resale of a commodity which bears, or the label or** content **of which bears, the trade mark, brand, or name of the producer or** owner **of such commodity, and which is in** fair **and open competition with commodities of the same general class produced by others** shall be deemed in violation of any law of the State of Louisiana . . .	Nothing contained in [the Sherman Act] shall render illegal contracts or agreements prescribing minimum prices for the **resale of a commodity which bears, or the label or** container **of which bears, the trade mark, brand, or name of the producer or** distributor **of such commodity, and which is in free and open competition with commodities of the same general class produced** or distributed **by others,** when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale . . .
(2) Willfully and knowingly, advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable . . .	

Note: Bold face indicates identity between statutes.

Some significance must be given to (1) the close correspondence between the Miller-Tydings Amendment and the contract clause of a fair trade act and (2)*the omission in the Amendment of any reference to non-signers.* It was no accident. If Section 2 of a fair trade act is necessary in order to enforce resale price maintenance against non-signers in intrastate transactions, equivalent federal legislative sanction also is necessary for interstate transactions.

The California Fair Trade Act of 1931, generally regarded as the first fair trade law, originally had no provision dealings with non-signers.[12] Section 1 of that statute, the contract clause, is similar to Section 1, the contract clause of the Louisiana law. In 1933, in order to reach non-contracting parties, California found it necessary to amend its law by adding the non-signer clause.[13] This amendment gave the California price-fixers the control they were seeking over non-contracting third parties. As the dissenting opinion of the court below so convincingly states:

> "Section 1 of the Louisiana Act relates, as likewise does the Federal Act, only to establishing the legality of the *contracts* in question. Thus far, the two statutes are in *pari materia*. Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully con-

[12] Cal. Stat. 1931, c. 278. In 1916 New Jersey enacted a statute called the "Notice Act", the nearest approach to a fair trade act before the California act. See Weigel, *The Fair Trade Acts* (1933).

[13] Cal. Stat. 1933, c. 260. The Amendment, Section 1½ of the California act, is identical with Section 2 of the Louisiana Fair Trade Law, except that the verbiage "at the suit of any person damaged thereby" follows the word "actionable".

tended that without Section 2, the provisions of Section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by Section 1. *The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act.*"

In terms, then, by the plain meaning of the words of the Act, the Miller-Tydings Amendment legalizes only resale price maintenance contracts. Whatever fine theory may be devised to rationalize price-fixing imposed by legislative fiat on non-signers [14]—such price-fixing is not contractual. There is no element of contracts present; there is no contractual relation whatever between the price-fixer and the non-signatory. Under the fair trade laws, one non-signatory may even bring suit against another non-signatory to enforce the terms of a fair trade contract, to which both are strangers. "Such a suit cannot be sustained on contract principles." Beaudette and Berens, "*The Non-Signer Clause of Fair Trade Acts: Constitutionality and Theory of Enforcement*", 25 Notre Dame Lawyer 529 (1950).

The obvious restriction of the Miller-Tydings Amendment to contractual resale price maintenance and the equally obvious non-contractual nature of resale price

[14] Theories of enforcement include: (1) prevention of tortious interference with contractual relations; (2) creation of an equitable servitude running with the chattel; (3) prevention of unfair competition; (4) protection of goodwill; (5) recognition of a statutory right. Beaudette and Berens, *The Non-Signer Clause of Fair Trade Acts: Constitutionality and Theory of Enforcement*, 25 Notre Dame Lawyer 529, 537 (1950).

maintenance imposed on non-signers in fair trade acts has not escaped attention of legal scholars:

> "The old resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply. The Fair Trade Acts pretend to be also based on contract. So the Supreme Court and Mr. Rogers point out that the Acts merely permit the parties to a sale to make a voluntary agreement as to resale prices if they so desire. But isn't that completely fanciful? A single contract between the manufacturer and a single retailer, if brought to the attention of the entire trade, is sufficient to bind the entire trade. . . . *Notice* of the fixed price, *not contract* is then the heart of the Fair Trade Acts. When the historical vestiges and the legal frills are pressed aside, the Acts provide for fixing resale prices by notice to prospective sellers. *This may be significant in a consideration of the Miller-Tydings amendment to the Sherman Act, providing that nothing therein 'shall render illegal, contracts or agreements* prescribing minimum prices'."
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> *Shulman, The Fair Trade Acts, 49 Yale L. Jour. 607, 618 (1940).*

In discussing the non-signer provision in a recent law review comment, the author writes:

> *"The Miller-Tydings Act merely echoes the first provision of the state acts and does not mention the non-signer section. This raises the issue of whether these sections [of state fair trade acts] are an attempted state regulation of interstate commerce.* Clearly, where the state forces non-contractors to observe prices established for fair-traded goods in inter-

state commerce, it is regulating that commerce. Although Congress may permit state regulation, without such permission the states cannot act. Passage of the federal statute with full knowledge of the state nonsigner provisions may indicate a legislative policy to grant such permission. . . . *It may be doubted, however, that state acts will finally be held applicable to interstate sales.*"

Boonstra, State Fair Trade Acts and Supplementary Federal Legislation, 47 Mich. L. Rev. 821, 826 (1949).

The dissenting opinion of the Court below makes the same point:

"Thus Congress has legalized the *contract* validated by State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law."

As to interstate commerce, Congress has occupied the legislative field and has barred the door to inconsistent state legislation, except as expressly authorized by the

Miller-Tydings Act.[15] See also 2 CCH Trade Reg. Para. 7308 (1950).[16]

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[15] In *Hood & Sons v. DuMond*, 336 U. S. 525, 537, 69 S. Ct. 657, 662 (1949) the Court distinguished between the "power of the state to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage [a distinction] deeply rooted in both our history and our law" . . . "The State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307 (1943) is cited in the brief for the United States by *Amicus Curiae* in support of the petition for writs of certiorari and in the briefs of respondents opposing the petition. In that case the Court said: "A state may not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." The Court held, however, that a statute establishing a state program for marketing raisins was not in violation of the Sherman Act. The dictum quoted is applicable to this case; the holding is easily distinguishable. (1) In *Parker v. Brown* the state was the moving force in the combination. At every step of the proration program there was a statutory prescription of public hearings, careful supervision at all stages by state officers, and the program was under the control of a state Proration Program Committee and the California Director of Agriculture. It was, therefore, *state action, not action by private individuals.* Under a fair trade act, prices are fixed by private persons under a standardless statute unsupervised by the state. A state may be beyond the application of the Sherman Act; private individuals are not. Nor can private individuals plead that they acted under a state law; if every state law constituted state action, no state law would ever offend the Sherman Act. (2) The California proration program was not only a state program in which California participated as the moving force, it was a program in which the federal government actively joined. Under authority of the Agriculture Adjustment Act (48 Stat. 31), the Secretary of Agriculture executed a marketing agreement with the California raisin growers; the California Proration Committee borrowed funds from the Commodity Credit Corporation, which was guided by the Department of Agriculture. The Department of Agriculture administered the Agricultural Marketing Agreement Act and the surplus commodities program. For several years California worked closely with the Department of Agriculture, the Commodity Credit Corporation, and the Surplus Marketing Administration. Federal funds were advanced, federal agencies approved the state program, and, for a time, a federal Sales Policy Committee actually fixed prices. "Here we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy." A joint venture with the state and federal governments as active participants hardly describes the Calvert-Seagram price-fixing scheme.

[16] "*Contracting* dealers are bound to maintain prices in both intrastate and interstate transactions. Their liability in intrastate trans-

With the wish father to the thought, respondents, and advocates of price-fixing generally, would like to interpret the Miller-Tydings Amendment as broad enabling legislation for resale price maintenance. It cannot be so interpreted.

> "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act."
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> *United States v. Bausch & Lomb, 316 U. S. 265, 62 S. Ct. 1070 (1942).*

If Congress had wished to do so, it would have been simple to have relaxed the prohibitions of the Sherman Act by excepting all resale price maintenance under state fair trade acts. The Amendment does not broadly except resale price maintenance. "It is important to note that the Miller-Tydings Act does not legalize price fixing agreements generally nor even all resale price-maintenance contracts. . . . The Act does

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actions rests on both a contractual basis and the provisions of the applicable Fair Trade Act. *In interstate sales their liability rests solely on a contractual basis, as it seems . . . that the state statutory provisions against selling below established prices cannot apply to interstate commerce.* Non-contracting dealers, not being under a contractual liability, are forced to maintain established prices only if they are subject to state statutory prohibitions. It seems that interstate sales should not be held subject to the prohibitions of any state law. The Federal Act [The Miller-Tydings Act] does not expressly provide that *non-contracting* dealers are bound to observe minimum prices in interstate sales. It will be noted that the state acts contain in essence two provisions: (1) that resale price maintenance contracts are legal, and (2) that all persons, including non-contracting dealers, are prohibited from selling below stipulated prices. [The Miller-Tydings Act] merely echoes the first provision—that resale price maintenance contracts involving interstate sales are legal under the Federal laws if resale is to be in a state which permits such contracts. The Federal Act contains no wording similar to the second provisions of the state acts." 2 CCH Trade Reg. Serv., para. 7308 (1950).

not give the maker of trade-marked goods *carte blanche* to engage in price-fixing combinations even with respect to those goods. He is permitted to make only the specified kind of contract referred to in the Act, under the conditions which have been named."[17] The contracts must comply with the following specified conditions: (1) The contract must relate only to commodities sold under the trade-mark, brand or name of the manufacturer or distributor. (2) The commodities must be in open competition with similar products, sold by others. (3) The contracts must be authorized by the law of the state in which the resale is to be made. (4) Horizontal agreements between competitors, or between those on the same economic level, are specifically forbidden.

The last condition throws light on the applicability of the Amendment to non-signers. Horizontal agreements are prohibited under the Amendment. The effect, however, of interpreting the Miller-Tydings Amendment to include resale price maintenance against non-signers is to defeat the prohibition against horizontal agreements. Horizontal price-fixing affecting *all* retailers may be secured through the expedient of a single contract with *one* retailer. Two manufacturers or distributors are prohibited from conspiring to fix prices. They may accomplish their purpose by means of the non-signer clause; one manufacturer enters into a contract with a retailer for the sale of goods at the same price as the goods are sold by the other manufacturer. Is it a pure coincidence that the fair trade price for a fifth of Calvert Reserve is $4.24 and the fair trade price for a fifth of Seagram's 7 Crown is also $4.24?

[17] Loevinger, *The Law of Free Enterprise*, 108 (1949).

The Amendment then is not enabling legislation for all resale price maintenance. It is a special dispensation for price-fixing contracts: not for all price-fixing contracts, only for those which comply with certain conditions specified in the Act.

The language of the Miller-Tydings Amendment is plain and unambiguous: it excepts from the prohibitions of the Sherman Act contractual resale price maintenance and only such price-fixing. It says so in terms. It says so in echoing the contract clause of a typical fair trade act and in omitting any reference to the non-signer clause or to resale price maintenance against non-signers. There is nothing in the normal meaning of the words to justify drawing on some unexpressed spirit for a construction that permits resale price maintenance by "contract or agreement" to include non-contractual resale price maintenance. That is a liberty with words that might be acceptable in *Through the Looking Glass*—but not in the Sherman Act. Petitioners submit that "the decision below does violence to the plain meaning of the words of the Miller-Tydings Act." *Brief for the United States as Amicus Curiae in Support of the Petition for Writs of Certiorari.*

II

The Miller-Tydings Amendment should be Construed Strictly.

Law and common sense agree that in statutory construction an exception or proviso should be narrowly construed. "The legislative purpose set forth

in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute." *Sutherland on Statutory Construction* (3d Ed. 1943), Section 4933.

This rule is applicable in any case involving the construction of an exception to a general statute, but it has particular force in the instant case.

The Sherman Act is more than most statutes. It is a great declaration of national policy. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. Federal Trade Commission*, 71 S. Ct. 240 (1951.) This Court has said:

> "It is not for us, however, to pick and choose between competing economic and business theories in applying [the Sherman] law. Congress has made the choice. It has declared that the rule of trade and commerce should be competition, not combination . . . Congress wanted to go to the utmost extent of its constitutional power . . . to make of ours, so far as Congress could under our dual system, a competitive business economy."
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> *U. S. v. Crescent Amusement Co., 323 U. S. 173, 187, 65 S. Ct. 254, 89 L. Ed. 160 (1944).*

The Sherman Act officially commits this country to the philosophy of free enterprise based on a competitive economy—perhaps the distinguishing characteristic of the American politico-economic system. Historically, the principle antedates the Sherman

Act; it is one of the oldest in American law, and is one that has had the long-standing approval of the American people. In terms of individual political freedom its importance cannot be overstated. "The freedom of man under capitalism is an effect of competition."[18]

Of all the enactments by Congress, the Sherman Act is probably the most general in its application. Indeed the Court has pointed out that "as a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, 359, 53 S. Ct. 471, 474 (1932).

The Court, therefore, construes the Sherman Act broadly and will not deviate from a broad construction of the Act even if it could be argued that a particular antitrust violation has a desirable purpose. It will not weigh the end, if the means are reprobated. These considerations have a unique validity in cases involving price-fixing: there is no rule of reason when private individuals combine to fix prices. Thus, in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S.

[18] A distinguished modern Austrian economist describing the relation between competition and freedom in a democracy writes: "No government and no civil law can guarantee and bring about freedom otherwise than by supporting and defending the fundamental institutions of the market economy . . . Where there is no market economy, the best intentioned provisions of constitutions and laws remain a dead letter. *The freedom of man under capitalism is an effect of competition* . . . The consumer is not at the mercy of the shop-keeper." Von Mises, *Human Action, A Treatise on Economics* 283 (1949).

Ct. 811 (1940), the Court said:

> "For over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense . . . If the so called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be *the charter of freedom which its framers intended.*"

In construing the law in this case, petitioners do not ask the Court to pass on the wisdom of the law. Petitioners suggest, however, that in determining whether the Miller-Tydings Amendment should be construed narrowly or broadly, it is appropriate to consider the relation of the Amendment to the national policy of a competitive business economy as set forth in the great "charter of freedom" that is the Sherman Act. This requires some economic evaluation of the Amendment and resale price maintenance.

The subject is highly controversial—among retail druggists and liquor dealers, but is hardly controversial at all among nonpartisan economists or among legal scholars who have analyzed the problem in the light of what has taken place since price-

fixing was first foistered on the public under the beguiling misnomer "fair trade".

The Miller-Tydings Act was smuggled into the law in the closing days of the legislative session of the Seventh-Fifth Congresss as a rider to a District of Columbia Appropriation Act, after Congress had failed to act on similar bills previously introduced, reported, and debated. When the bill reached the President's desk for signature, a veto of the bill would have handicapped the operation of the City of Washington. The President had consistently opposed such legislation and when he signed the bill, he expressed the hope that the act "will not be as harmful as most people predict".[19] The Federal Trade Commission[20] and the Department of Justice[21] opposed its

[19] N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

[20] "Minimum resale price maintenance was originally advocated by manufacturers of highly individualized, trade-named or branded products as a means of protecting them from unrestrained price cutting among dealers to whom the products were sold outright. When finally enacted by the states and by the Congress, however, its enactment was urged almost entirely by a few well organized dealer groups as a means of eliminating price competition both of dealers using the same methods of distribution and of dealers using new and different methods of distribution . . . The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies, unregulated by public authority . . . The essence of resale price maintenance is control of price competition . . . to the detriment of consumers . . . The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded product." *FTC Report on Resale Price Maintenance* (1945), p. LIV, LIX, LXIV. In an earlier report the Federal Trade Commission also disapproved of resale price maintenance. See FTC Report on Resale Price Maintenance (1931) Part II, 165.

[21] "The Department [of Justice] recommends the repeal of the Miller-Tydings Amendment . . . Already the record shows that it does not serve the purposes which were urged upon Congress as a reason for its passage, that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and that it becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment." *FTC Report on Resale Maintenance* (1945) LXIII. See also testimony of Herbert A. Bergson, Asst. Attorney General, before the Subcommittee of the House Judiciary Committee, July 27, 1949.

enactment. The Act has been condemned by the Temporary National Economic Committee,[22] the President's Council of Economic Advisors,[23] and by virtually all economists and legal writers who have written on the subject. In a recent carefully considered article, the author states:

> "The technique used to secure the passage of the Miller-Tydings Act repudiates the thesis that we need not regard this Act as any intentional modification of our traditions. The Act is an aberration, fostered and propelled by a minority pressure group. It will die because of the weakness of its internal structure; but for the good of the body politic and economic, it should be killed, swiftly and definitely."
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> *Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 54 (1949).*

A large volume of water has flowed over the dam since the *Dr. Miles Medical* case, 220 U. S. 373, 31 S. Ct. 376 (1911) [24] and since the *Old Dearborn Dist.*

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[22] The Temporary National Economic Committee approved the following recommendation: "The Miller-Tydings Enabling Act, which legalizes resale price maintenance contracts in interestate commerce, results in some of those economic and social practices to be expected from private price-fixing conspiracies. The legal sanction of such practices tends to undermine the basic tenets of a competitive economy and introduces rigidities into the pricing of certain goods which restrain trade. Consequently, we recommend to the Congress the repeal of the Miller-Tydings Enabling Act." *Federal Trade Commission Report on Resale Price Maintenance*, (1945), LXIII. See TNEC Final Report (1941).

[23] Third Annual Report to the President by Council of Economic Advisors.

[24] When Mr. Justice Holmes wrote his dissent in the *Dr. Miles Medical* case, 220 U. S. 373, 31 S. Ct. 376 (1911) and when Mr. Justice Brandeis wrote *"Cutthroat Prices—The Competition that Kills"*, Harper's Weekly, Nov. 15, 1913, neither envisaged a non-signer clause. Mr. Justice Brandeis and other sincere advocates wished to protect the manufacturer's property right in goodwill and to prevent predatory price-cutting. Of course, the economics of

Co. v. Seagram Distillers, 229 U. S. 183, 57 S. Ct. 139 (1936). In retrospect, it has been said that Mr. Justice Sutherland's opinion in the *Old Dearborn* case seems like "reminiscing about resale price maintenance when it was young, fresh, and fair".[25] Since then, the fair trade acts designed to protect the property interest of the manufacturer in the trade-mark or brand name have turned out "to be a blackjack in

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merchandising do not support the thesis that only "knaves" cut prices. "Price cutting based upon superior efficiency is essential to the ideal of our economic system." McLaughlin, *Fair Trade Acts*, 86 Pa. L. Rev. 803, 812 (1938). One student of resale price maintenance has written: "At the beginning of this Fair Trade movement there were men who advanced arguments in which they sincerely believed [Mr. Justice Brandeis, for example] . . . . There is ample reason to doubt this sincerity to-day . . . . What was once a sincere defense of a property right has become the pretext for bludgeoning of one economic group for the benefit of another." Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 37 (1950).

[25] Shulman, *The Fair Trade Acts*, 49 Yale L. Jour. 607, 615 (1940). Justice Sutherland's opinion has been characterized as "to a considerable degree divorced from the economic realities." Note, *Compulsory Resale Price Maintenance in Liquor*, 57 Yale L. J. 459, 470 (1948). Decisions of some of the lower courts were closer to the economic realities. Judge Samuel I. Rosenman, when a member of the New York Supreme Court, in an opinion that has been widely quoted, holding the New York Fair Trade Law unconstitutional, said: "The law applies to all retailers, irrespective of their motive or intent in selling their own property at lower prices. Without regard to the effect upon competitors, the retailer by this statute is compelled to charge his customers a higher price than might afford him a reasonable profit . . . . Even though a retailer charges a fair price for his commodity involving a fair profit to himself, he may still be enjoined or mulcted in damages merely because the price he charges is not as exorbitant as the producer desires it to be . . . . An analysis of this statute discloses several startling features so arbitrary and discriminatory in effect that the statute cannot be sustained . . . in so far as it applies to retailers who have not signed price maintenance agreements . . . . It is left to private individuals, producers, to determine, first, whether prices should be fixed, and, second, at what level. No outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard on either question. The retailer, who is going to be restricted in the conduct of his own business by the conclusions reached, is not allowed to present his views as to the reasonableness of the price, or indeed, as to the necessity for fixing any price. The consumer, who must bear the burden of the increased price, has no opportunity to be heard before the prices are fixed." *Coty, Inc. v. Hearn Department Stores*, 158 Misc. 516, 284 N. Y. S. 909 (1935).

the hands of the retailers". DeGanahl, *Trade Practices and Price Controls in the Alcohol Beverage Industry*, 7 Duke Law and Contemporary Problems 664 (1940.) "[The Fair Trade Acts] permit elimination of price competition in the distribution of goods even when differences in price reflect only differences in efficiency. They permit competition between producers, between commodities, but restrain competition between distributors, between different methods of distribution. They permit the fixing of prices in what may be the worst way—not by a public body, not in accordance with even vague, prescribed standards, not for named commodities or classes of goods, but by the unilateral action of any private trade-mark owner for any goods marketed under his trade-mark." Shulman, *The Fair Trade Acts*, 49 Yale L. Jour. 607, 619 (1940.) "Irrespective of the constitutional issues, economic issues in abundance are arrayed against compulsory resale price maintenance . . . Consumers are either priced out of the market or are forced to pay a higher price than is necessary; the waste of resources represented by an excessive number of outlets is encouraged." Note, *Compulsory Resale Price Maintenance in Liquor*, 57 Yale L. Jour. 459, 470-471 (1948.) "The business man [ought] to be encouraged to attract trade by economies of operation and by passing on his economies to the consumer . . . Any scheme which would effectually prevent the cash-and-carry consumer from buying at a cheaper price than the consumer who gets elaborate delivery and other service plus costly credit is a *vicious* scheme. Any program which endeavors to restrain price com-

petition based upon efficiency requires a showing of exceptional circumstances to warrant a hearing." McLaughlin, *Fair Trade Acts*, 86 Pa. L. Rev. 803 (1938).

Analyzing the economic effects of fair trade acts on manufacturer, retailer, and consumer, one writer concludes: "Fair Trade Acts and resale price maintenance protect a selfish pressure group at the expense of the public. The Fair Trade Acts eliminate price competition in the distribution of goods, even when differences in price reflect only differences in efficiency. They restrain competition between distributors. They permit the fixing of prices by any private trade-mark owner for any goods marketed under his trade-mark. Many times the owners is forced into setting a price. No public body intervenes nor are there any prescribed standards. *These are, without a doubt, in conflict with all the principles of a free competitive economy.* Once more a re-examination of the entire issue of resale price maintenance and the Fair Trade Acts is urged. It may be that there are evils to be corrected, but on the basis of experience let us get at those evils without undermining all that free competition stands for.[26]

[26] Use of "loss leaders" is one of the alleged evils most inveighed against in the early literature of resale price maintenance. This was the predatory price-cutting Brandeis feared. Brandeis, *Business—a Profession* (1914). Actually, however, both the extent and the use of loss leaders and the harm they cause are largely speculative; the term amounts to little more than an epithet. Nelson, *Trade Practice Conference Rules and the Consumer*, 8 Geo. Wash. L. Rev. 452, 460 (1940). There is not much said about loss leaders now, thanks largely to statutes in thirty-one states, including Louisiana, which deal with this problem by prohibiting sales below cost. Cost is defined variously; in Louisiana as invoice cost or replacement cost, less discounts, plus freight and a

Fair trade laws are not the answer." Schachtman, *Resale Price Maintenance*, 11 Pitt. L. Rev. 562, 590 (1950). In a comprehensive study of free enterprise, the author summarizes his conclusions as follows:

> "These [fair trade laws] are completely inconsistent with the philosophy of free enterprise and with the pattern of our other legislation. They disregard the interest of the consumer in price competition, protect a particular class of producers, and favor the inefficient, high-cost distributor rather than the efficient seller . . . The fair trade laws seem to be an unjustified infringement of the entrepreneur's and the consumer's economic liberty."

Loevinger, Law of Free Enterprise, (1949), p. 283.

Published material on resale price maintenance is extensive. Many other quotations might be added. Counsel wish particularly to call to the attention of the Court two recent and very able studies on the subject, both previously cited. Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24 (1949) and Schachtman, *Resale Price Maintenance and the Fair Trade Laws*, 11 Pitt. L. Rev. 562 (1950).

6% mark-up. La. Act 338 of 1940; R. S. 51:421-427. Such laws prevent invidious price wars. These statutes have been severely criticized. See Lovell, *Sales Below Cost Prohibitions*, 57 Yale L. Jour. 391 (1948). At least, however, such laws are aimed at *predatory* price reductions; they attempt to differentiate between good and bad price-cutting. "The Fair Trade Acts do not do this. Resale price maintenance stifles good competition which is absolutely essential to our competitive system." Schachtman, *Resale Price Maintenance*, 11 Pitt. L. Rev. 563, 589 (1950). "If 'predatory' loss selling is in truth the major threat that the adherents of 'fair' trade claim, it would certainly be preferable to devise laws directed at this *specific* evil than to strike, as at present, at all price competition, good and bad." *The Fair Trade Controversy, Fortune*, 75 (April, 1949).

The conclusions of the Department of Justice, the Federal Trade Commission, the Temporary National Economic Committee, the President's Council of Economic Advisers, and numerous economists and legal scholars demonstrate that, whatever may have been the original purpose of the Miller-Tydings Amendment, or the motives of its proponents—experience has shown that the Amendment is completely inconsistent with the philosophy of free enterprise in a competitive economy as set forth in the Sherman Act. Petitioners submit therefore that the scope of the Amendment should be narrowly confined to the literal meaning of the Act.

"The general policy of the antitrust laws is a broad one; the [Miller-Tydings] exception is narrow and will be strictly construed. To gain the benefit of the exception, one must comply strictly with all its terms." Loevinger, *The Law of Free Enterprise*, p. 108 (1949). The cases which have been before the Court involving the Miller-Tydings Amendment show that the Court has followed this course of construing the provision strictly. *U. S. v. Univis Lens Co.*, 316 U. S. 241, 62 S. Ct. 1088 (1942); *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805 (1944); *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945). *Cf. Kiefer-Stewart Co. v. Joseph Seagram & Sons*, 71 S. Ct. 259 (1951).

"A literal reading of the [Miller-Tydings] amendment would seem to indicate that the scope of the enactment is limited to legalizing only 'contracts or

agreements' in interstate commerce";[27] it does not extend immunity to price-fixing *quoad* strangers to these contracts.

III

The Court should not go into the Legislative History in this Case. Here, Resort to Legislative History Creates, It Does Not Resolve, Ambiguities.

It is one thing to examine legislative history to resolve an ambiguity. It is another thing to go into legislative history to *create* an ambiguity. The Miller-Tydings Amendment is plain and unambiguous. On its face it legalizes price-fixing *by contract*, but not price-fixing beyond contract. Not unless one dredges through congressional debates and reports can any evidence be dug up of an intention (on the part of some legislators) to give immunity to non-contractual price fixing. And this intention is rebutted by contrary evidence in the legislative background. Petitioners submit that the Court should not resort to legislative history to ascertain what the legislature intended, when the language is clear.

The instant case should be governed by the principle as stated by Mr. Justice Jackson, quoting Mr. Justice Holmes:

> "We do not inquire what the legislature meant, we ask only what the statute means." [28]

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[27] Green, *Resale Price Maintenance*, 25 Wash. L. Rev. 265, 271 (1950).
[28] Jackson, *The Meaning of Statutes: What Congress or What the Court Says*, A. B. A. Jour. 535 (1948).

This issue goes to the nature of law. Society must base its actions on objective standards; on the common acceptance of words as written in a statute.[29] "The words employed are taken as a final expression of the meaning intended." *United States v. Missouri Pacific Ry.*, 278 U. S. 269, 49 S. Ct 133 (1929).

As a matter of statutory construction, the rule is well settled that where the meaning of a statute is plain, the court should not alter its meaning by conclusions deduced from legislative history of the statute. Sutherland states the rule: "The most common rule of statutory interpretation is the rule that a statute clear and unambiguous on its face need not and cannot be interpreted by a court and only those statutes which are ambiguous and of doubtful meaning are subject to the processes of statutory interpretation." *Sutherland on Statutory Construction* (3d Ed. 1943), Sec. 4502. See also Sec. 4702.

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[29] Wurzel, in a monograph entitled *Das Juristiche Derken*, published in translation in *Modern Legal Philosophy Series: Science of Legal Method*, p. 353 (1917), gives two quotations from foreign jurists that are apt here: "Thus Hahn has said: 'Law is not what the legislator intends, but what he has solemnly, by his statute, declared to be that which he intends' . . . Janka asserts . . . 'interpretation has to deal with the statute, with the legislative expression, and not with the legislative intention that may lie behind the expressed declaration. If the legislator has intended to express something different from what he has expressed, or if he has intended to express something he did not express, yet, even if the divergence were conclusively proved by extraneous evidence, that which has been expressed is in effect in the form in which it is expressed." Coming closer to home, Horack, editor of the latest edition of Sutherland on *Statutory Construction*, observes that "even though words have no intrinsic meaning it is fair to impose reasonable uniformity in the use of symbols or otherwise the art of communication must surely fail" and "one who uses them differently must disclose the difference or be bound by the common parlance of the society in which the words are used." Horack, *Disintegration of Statutory Construction*, 24 Ind. L. Jour. 335, 337 (1949).

In an early case the Court said:

> "The spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other and would be inconsistent unless the nature and common import of the word be validated, interpretation becomes necessary; and to depart from the obvious meaning of words is justifiable. Yet, in most cases, *the plain meaning* of a provision not contradicted by any other provision in the same instrument, *is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application.*"
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> *Sturges v. Crowingshield, 4 Wheat. (17 U. S.) 122, 4 L. Ed. 529 (1819).*

Nearly a century later, the Court had not changed its position:

> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."
>
> *Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192 (1916).*

> ". . . extrinsic aids to construction [may be used] *to resolve but not to create ambiguity.*" *U. S. v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83, 53 S. Ct. 42 (1932).*

The plain meaning canon raises a preliminary issue of the propriety of resorting to legislative history. That preliminary issue here is whether the phrase "contracts or agreements" is ambiguous. Only if the Court should agree with respondents' contention that the phrase is ambiguous, should resort he had to legislative history. "The frequently quoted formula that extrinsic aids may be restored to 'to resolve but not to create ambiguity' can only mean that the evidence provided by such aids should be considered solely for the light which it throws upon the proper resolution of a doubt or 'ambiguity' apparent to the court *before* it examines the extrinsic sources. In other words, the theory of the plain meaning doctrine is that the 'ambiguity' or 'absurdity' which will take the case outside the scope of its application must be discoverable upon a bare or literal reading of the text, wholly apart from the background or context which the committee reports and other extrinsic sources provide."[30]

The Court has, in several instances, upheld the literal meaning of a statute *even where the legisla-*

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[30] Jones, The Plain Meaning Rule, 25 Wash. U. L. Q. 2, 11 (1939). The author also states: "The evidence afforded by extrinsic aids, logically speaking should be irrelevant unless the interpreting court has first come to the conclusion either that the statute is 'ambiguous' with respect to the fact situation of the particular controversy, or that the application of the statute, according to its literal meaning, would lead to 'absurd or wholly impracticable consequences'."

tive history conclusively demonstrated that the literal meaning did violence to the legislative intention.

In *Caminetti v. U. S.*, 242 U. S. 470, 37 S. Ct. 192 (1916) the Court was called upon to decide whether the Mann Act, which makes it a federal offense to aid in the transportation of a woman across a state line "for the purpose of prostitution or debauchery or any other immoral purpose," applied to a man who transported his mistress across a state boundary. There was no question of "white slavery". The legislative history showed beyond any doubt that the author of the law and the Congressional Committees considered the Act inapplicable to such cases, because the law was aimed at commercialized vice and the white slave trade. Mann, as author of the bill and as Committee Chairman, had stated unequivocally that the Act would be inapplicable to a case such as the one before the Court. Nevertheless, the Court held the language plain and unambiguous. Under the plain meaning rule, and a holding that the phrase "or other immoral purpose" included conduct such as in the case before the Court, the Court refused to go into the Congressional intent.

Another striking illustration occurred in the field of liquor regulation. Section 2 of the Twenty-First Amendment prohibits the "transportation or importation into any state . . . of intoxicating liquors, in violation thereof." In *State Board of Liquidation v. Young's Market Co.*, 299 U. S. 59, 57 S. Ct. 77 (1936) the plaintiff demonstrated from legislative history

that a literal reading of Section 2 did violence to the intention of Congress, that Section 2 of the Twenty-First Amendment was intended to apply only to the laws of dry states, and that the states could pass laws burdening commerce, only if the laws related to public health, safety, or morals. The Court met this argument with the plain meaning rule:

> "The plaintiffs argue that limitation of the broad language of the Twenty-First Amendment is sanctioned by its history; and by decisions of this court on the Wilson Act, the Webb-Kenyon Act [the language of the amendment tracked the Webb-Kenyon Act, as was pointed out in the congressional debates], and the Reed Amendment. *As we think the language of the Amendment is clear, we do not discuss these matters.*"

The Court recently has reasserted this principle in the following language:

> "Petitioners' chief argument proceeds not from one side or the other of the literal boundaries of Section 1404(a) [of the Judicial Code], but from the legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear . . .* This canon of construction has received consistent adherence in our decisions."
>
> *Ex Parte Collette, 337 U. S. 55, 61, 69 S. Ct. 944, 947 (1949).*

See also *Gemsco v. Walling*, 324 U. S. 244, 260, 65 S. Ct. 605, 614-615 (1945), and *Packard Motor Car Co. v. N. L. R. B.*, 330 U. S. 485, 492, 67 S. Ct. 789, 793 (1947).

Resort to legislative history is a last resort. It is becoming more and more divorced from reality.[31] There are 96 senators and 435 congressmen in the Congress of the United States. What may have been in the minds of these 531 individuals when they enacted any statute is impossible to divine. When a statute is controversial and there is a multiplicity of reports and a welter of debate, extending over many sessions, collective legislative intent becomes a pure fiction. The legislative intent of 531 legislators is best evidenced by the language they enact into law and not by a dredging operation that may dig up pronouncements by one or two legislative friends of the lobby that pressured for or against a particular bill.

Petitioners are confident that consideration of the entire legislative background of the Miller-Tydings Amendment will prove beyond a doubt that it was intended as a very limited exception for permissive resale price maintenance contracts only. But it should be unnecessary to go into this legislative history. The language of the Amendment speaks for itself.

Discussion of Opinion Below in Relation to Clear and Unambiguous Holding of Court: Error of Majority of Court Below.

Counsel for petitioners confess an inability to understand the reasoning in the majority opinion of

[31] "The least reflection makes it clear that . . . a legislature . . . has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs." Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 869 (1930).

the court below. With all due deference, counsel believe that the majority of the court fell into a two-fold error: (1) a misuse of the term "contracts" and, as a result, (2) a misconception of the issue.

The majority and minority opinions agree the Miller-Tydings Amendment is so clear and unambiguous that there should be no resort to legislative history. At first blush one might conclude that this agreement between the majority and minority of the court below is irreconcilable with their diverging conclusions, and that the Miller-Tydings Amendment necessarily must be ambiguous. This does not necessarily follow. Counsel do not wish to ascend into the rarefied atmosphere of semantics, but submit that the fact that a term means different things to different persons does not necessarily prove the term ambiguous. One of the two persons may have erred in his understanding of the meaning of the word or in his application of the word to a factual situation. Suppose that a court were called on to construe a statute covering "negotiable instruments" and to apply the statute to a case involving a promissory note payable to a named payee rather than to the order of the payee. If, by some strained process, difficult to understand, a majority of the court concluded that the note were within the purview of the statute—such a conclusion would not prove that the term "negotiable instruments" has uncertainty of meaning. There is a rule of reason in determining whether a word or phrase is ambiguous. Counsel submit that "contracts or agreements" is no more doubtful than "negotiable instruments." "Negotiable" would not

refer to a "non-negotiable" note. Resale price maintenance by contract should not include resale price maintenance *not* by contract. The term "contracts or agreements" apparently was perfectly clear to the majority of the court below, but, for some reason which defies counsel's understanding, the majority of the court below applied the term to a situation where there was no element of contracts involved.

The misapplication of the term led the majority of the court below to a misconception of the issue. The majority regarded "the main battleground [to be] . . . whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act the price maintenance contracts relied on in this case". This is not the issue. There is no dispute as to whether the Amendment is effective to relieve from the prohibitions of the Sherman Act these price maintenance contracts. Rather, the issue is the applicability of the Amendment to price-fixing over and beyond these contracts, that is, the enforceability of resale price maintenance against non-contracting parties. The majority opinion states that "the proponents of . . . the fullest scope for state fair trade statutes needed only the passage of a federal act relieving . . . contracts . . . from the [Sherman Act]." Counsel contend that this begs the question since it rests on the a *priori* assumption that "contracts" include, what, for lack of a better term, might be called non-contracts.

In accordance with its conception of the issue, the majority of the court below made much of the inher-

ent power of the states to enact fair trade laws: "[It was not necessary] to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power . . . . In insisting, therefore, that the Miller-Tydings Amendment is ineffective . . . as to non-signers because it . . . does not in terms grant to the states power to make such laws effective against non-signers of such contracts, appellants wholly misconceive the issue." The majority opinion further states that lifting of Sherman Act prohibitions of resale price maintenance contracts "removed every prohibition from, or impediment in the way of, the enactment by states of fair trade laws, binding alike on signers and non-signers."

The fallacy in the majority opinion lies in treating the problem as one of authority of the states to *enact* fair trade laws. Actually, the problem is the *enforceability* of resale price maintenance, valid under state law, against a non-contracting party in an *interstate* transaction. In this case petitioners do not question a state's power to enact a fair trade law, *regulating intrastate transactions*, against signers and non-signers. But a state's authority is limited by the commerce clause of the United States Constitution, the Sherman Act, and other federal statutes in the field of interstate commerce. (See pages 22 and 23 of this brief and footnotes 15 and 16.) Counsel believe that the correct view is expressed in the minority opinion:

> "Congress has legalized the *contract* validated by the State law, but not every provision of the

statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him; such provision of the State statutes must yield to paramount Federal law."

IV.

The Legislative Background of the Miller-Tydings Amendment shows this Exception to the Sherman Act was Intended to Apply only to Resale Price Maintenance by Permissive Contracts or Agreements; that is, to Voluntary Resale Price Maintenance Only Between Contracting Parties.

The legislative history of the Miller-Tydings Act is long,[32] but the pattern becomes clear if one can both see it as a whole and recognize the close relation of its parts. The Amendment is the last of a series of interlocking bills that began as a reaction to *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 S. Ct. 376 (1911). The components of the series, from the Stevens bill of 1914 through the Capper-Kelly bills to the Miller-Tydings Act, do not vary in substance and show little variance in language. Form and substance were originated prior to the existence of a non-signer clause, or even of a fair trade law. From first to last, the bills were designed only to erase the

[32] The legislative background is considered at length in Appendix E, p. 66.

taint of illegality attached to voluntary resale price maintenance between contracting parties—the type of price-fixing condemned in the *Dr. Miles* case.

In the *Dr. Miles* case, Justice Holmes wrote a vigorrous dissent in which he urged the validity of resale price maintenance contracts. He said:

> "[There is a contract between Dr. Miles Medical Co. and] the retail agents . . . fixing the price below which they will not sell to the public. *There is no attempt to attach a contract or condition to the goods* . . . or in any way to restrict dealings with them after they leave the hands of the [contracting] retailmen. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids *a purchaser to contract with his vendor* that he will not sell below a certain price . . ."[33]

This decision aroused considerable interest. In 1913 a group of *manufacturers* formed the Fair Trade League to force legislative action. Within a year, the Stevens bill was introduced in the Sixty-Third Congress to legalize contracts between manufacturers and retailers fixing resale prices.[34] Failure of enactment of this bill brought forth the Stephens bill in 1916. Next came the Kelly bills, introduced in the Sixty-Fifth, Sixty-Sixth, Sixty-Seventh, Sixty-Eighth, and Sixty-Ninth Congresses (1917-1925). Then, the important Capper-Kelly bills were introduced in the

[33] *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 410-411, 31 S. Ct. 376 (1911).

[34] It is said that Justice Brandeis was the author of the bill. See Mason, *Brandeis, A Free Man's Life* (1946), p. 502.

Seventieth, Seventy-First, Seventy-Second, and Seventy-Third Congresses (1927-1933).[35]

Each of these bills was presented to Congress as a legislative endeavor to avoid the *Dr. Miles* case. Representative Kelly stated that: "Up to that time [1911] any independent manufacturer could make an agreement with his distributor as to resale prices but that right was taken away by a decision of the Supreme Court in the Doctor Miles case", and that the bill was designed "to restore a right which was universally held up until [the *Dr. Miles* decision]."[36] The co-author of the bills, Senator Capper, referred to the measure as being designed to write into law the minority opinion of Justice Holmes in the *Dr. Miles* case.[37] This purpose was reiterated in the debate in both Houses of the Congress.[38]

From 1933 to 1935, there was an hiatus. In this period no resale price maintenance bills were introduced because many of the retail codes adopted under the National Industrial Recovery Act fixed prices, authorized minimum mark-ups, and generally permitted resale price maintenance.

Meantime, discouraged by the attitude of Congress, advocates of resale price maintenance had turned their attention to the states. In 1931, California

[35] See Appendix E for a more detailed account of this early legislation and for references to the bill numbers.
[36] 74 Cong. Rec. 361.
[37] 75 Cong. Rec. 14989.
[38] 72 Cong. Rec. 9517; 74 Cong. Rec. 361, 2398, 3485, 3527; 75 Cong. Rec. 14989; 76 Cong. Rec. 482, 3596.

adopted the first fair trade act,[39] using as a model the version of the Capper-Kelly bill introduced in the Seventy-First Congress, which did not contain a non-signer clause.[40] The language of the two is virtually identical,[41] and the California Act of 1931 was called the "Junior Capper-Kelly bill." [42]

Thus far no one had considered construing a bill or statute legalizing resale price maintenance contracts as applicable to non-contractual price-fixing. In 1933 the non-signer scheme was devised, in order to reach non-contracting retailers. In that year the California Fair Trade Act was amended, by the addition of the non-signer clause (Section 1½).[43] This amended California Act furnished the basis for subsequent state fair trade acts, including the Louisiana Act.

It should be noted that the provisions of the Louisiana Fair Trade Act, like the provisions of the California Fair Trade Act, are virtually identical with the Capper-Kelly bill, *except for the non-signer clause.* (Compare Appendix B with Appendix C.)

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[39] Cal. stat. 1931, c. 278.

[40] H. R. 11, 71st Cong., 1st Sess. (1929).

[41] The Capper-Kelly bill is printed in Appendix C. The Louisiana Fair Trade Law is printed in Appendix B. The Louisiana statute followed exactly the California statute, even in enacting into law a typographical error.

[42] Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting. 24 Calif. L. Rev. 640, 641 (1936).

[43] Cal. Stat. 1933, c. 260. This *non-signer clause* as added to the California Act reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this act, whether the person so advertising, offering for sale or selling is not a party to such contract, is unfair competition and actionable at the suit of any person damaged thereby." There is little or no difference in the wording of this clause and the wording of the non-signer clause in the fair trade laws of other states.

In 1936, in the *Old Dearborn* case, the Court upheld the constitutionality of a state fair trade act, but pointed out that its opinion was restricted to the constitutionality of the Illinois Fair Trade Act and reiterated its position that a fair trade "agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Act." *Old Dearborn Dist. Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 195, 57 S. Ct. 139 (1936).

This language made it clear that notwithstanding the constitutionality of state fair trade laws, the *Dr. Miles* decision invalidating resale price maintenance contracts in interstate transactions was still good law. An exception to the Sherman Act, therefore was necessary at the federal level. *Here was the crucial point in the legislative history.* At that point all of the twelve state fair trade laws then in existence contained the non-signer clause, which had been added to the original California Fair Trade Law. If the proponents of resale price maintenance really had intended asking for broad enabling legislation covering non-contractual price-fixing along with contractual resale price maintenance, then was time to do it and candidly to inform Congress of the scope of their proposed legislation. This they did not do. *Was it because advocates of resale price maintenance knew that a Congress unwilling to enact a Capper-Kelly bill would never enact a federal fair trade law expressly covering non-signers?* The original Miller-Tydings bill, S. 3822 of the Seventy-Fourth Congress, was virtu-

ally identical with the Capper-Kelly bill,[44] drawn, introduced, and debated before the existence of fair trade acts or non-signer clauses. S. 3822 did not refer to non-signers. If the friends of the measure thought that S. 3822 might include *non-contractual* resale price manitenance, they were very careful to conceal the thought from Congress.

Neither Senate report[45] on S. 3822 nor Senator Tydings' explanation on the floor of the Senate mentions the non-signer clause in state acts or suggests that resale price maintenance by contract could be imposed upon strangers to such a contract. Senator Tydings' argument in favor of S. 3822 was that the bill "grows out of the fact that twelve states have all adopted acts within their states regulating loss-leader selling and the making of *contracts* between a manufacturer and a distributor of an article."[46] If the bill was "nothing more than an enabling act", it was an enabling act for resale price maintenance by *contract*. The Senate passed the bill; the House took no action.

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[44] Compare the Miller-Tydings Amendment (Appendix A) with the Capper-Kelly bill (Appendix C). Differences are largely owing to a difference in approach. The Capper-Kelly bill was an independent statute providing that resale price maintenance contracts were not violative of "any statute of the United States". The Miller-Tydings bill was an amendment to the Sherman Act. The purpose of S. 3822 was to permit "contracts or agreements prescribing minimum prices *or other conditions*. . . ." S. 3822 differs from the Capper-Kelly bill in that it added the phrase "or other conditions".

[45] Sen. Rep. No. 2053, 74th Cong., 2d Sess. (1936). "S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such *contracts* . . . In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts."

[46] 80 Cong. Rec. 8483. The non-signer clause, it should be noted, is aimed at fixing a uniform minimum retail price: loss-leader statutes are aimed at predatory selling below cost. Of the forty-five states which now have fair trade acts, thirty-one also have separate loss-leader ("Sales Below Cost", "Unfair Sales") statutes. See footnote 26 on p. 24.

Shortly after the Seventy-Fifth Congress convened in 1937, another Miller-Tydings bill was introduced, in the Senate by Senator Tydings (as S. 100), in the House by Representative Miller (as H. R. 1611). Here again was an opportunity for a straight-forward explanation that proponents of resale price maintenance wished to avoid the hazards of competition, not only by resale price maintenance *contracts* but by non-contractual price-fixing imposed on non-contracting parties. *Here again was the time to go beyond the Capper-Kelly language by adding a non-signer clause at the federal level just as California and the other states had to go beyond the Junior Capper-Kelly bill at the state level.* But S. 100 and H. R. 1611 follow S. 3822 of the previous session and the old Capper-Kelly bills; the bills contain no reference to non-signers. The Senate Report on S. 100 stated that the bill was similar to S. 3822 of the previous Congress and that the report on S. 3822 was applicable to S. 100. *Sen. Rep 257, 75th Cong., 1st Sess.* (1937).

However, for the first time an express mention of the non-signer clause appeared in a congressional report. House Report 382 on H. R. 1611, in a passing reference, stated that under state fair trade laws "*third parties* with notice are bound by the terms of a [fair trade] contract". The report does not discuss the non-signer problem. The Report explicitly provided:

> "The sole objective of the proposed legislation is to permit the public policy of states having fair trade acts to operate with respect to interstate *contracts* for the resale of goods within those states . . . In view

of the decision of the Supreme Court in *Dr. Miles Medical Co. v. Parker & Sons Co.*, 220 U. S. 373, and other cases, it is doubtful that *such contracts* are now valid in interstate commerce."

If Senator Tydings was under the impression that the bill permitted compulsory price-fixing by means of a non-signer clause, he managed to convey exactly the opposite impression. For example, he declared, "I have never voted for a price-fixing bill in my life."[47]

Before the Senate voted on the bill, President Franklin D. Roosevelt wrote the Senate a letter in which he stated that his "attention was called to S. 100, which would render legal certain *contracts* for the maintenance of resale prices now illegal under Federal law," [48] and he recommended that the bill be studied further. The President enclosed a letter of the Chairman of the Federal Trade Commission objecting to the measure, which shows that the Chairman had knowledge of non-signer clauses in state laws. The Chairman referred to the "peculiar feature" that "a private contract . . . apart from any supervision as to reasonableness is made binding upon all dealers and the consuming public". Other Administration objections had been voiced by the Department of Justice and the department of Agriculture.[49] After the President's letter was received, neither House acted on the legislation.

[47] 81 Cong. Rec. 7496. Senator Tydings had stated that he wanted to eliminate loss-leader selling, but avoided proposing a loss-leader bill because such laws could not be made permissive. Hearings before Subcommittee of Committee on the Judiciary on S. 100, 75th Cong., 1st Sess. 43 (1937).

[48] Sen. Misc. Doc. 58, 75th Cong., 1st Sess. (1937).

[49] FTC Report on Resale Price Maintenance LXII (1945).

H. R. 7472, an appropriation bill for the District of Columbia, passed the House June 18, 1937. When it was referred to the Senate Committee on the District of Columbia, an unrelated rider was attached. This rider, the Miller-Tydings bill, which appeared as Title VIII, was identical with S. 100 and H. R. 1611. On August 17, 1937 the President reluctantly [50] signed the bill and Title VIII was enacted into law as the Miller-Tydings Amendment to the Sherman Act.

Reviewing the congressional debates, one finds only two unequivocal statements that the proposed legislation would permit price maintenance against non-signers.[51] No majority report discusses specifically price-fixing forced on non-signers.[52] Neither Senator Tydings nor Representative Miller expressly adverted to the binding of non-signers in interstate transactions. The fact is, that the Miller-Tydings bills, like the Capper-Kelly bills, were presented to

[50] The President expressed the hope that the act "will not be as harmful as most people predict". N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

[51] Senator King, an opponent, was not explicit although he referred to the non-signer clause and also read the letter of the Chairman of the Federal Trade Commission. 81 Cong. Rec. 7491, Representative McLaughlin, a proponent, was under the impression that H. R. 1611 legalized price maintenance against non-signers. This position is difficult to reconcile with his representation of the bill as purely permissive. "H. R. 1611 . . . is entirely a permissive act. It merely allows a seller and buyer of trade-marked or identified goods . . . to contract for resale of goods according to state law, *if they want to do so.* It does not compel the buyer and seller to enter a contract, but only authorizes them to do so, if they desire." 81 Cong. Rec. 8142.

[52] In a minority report on S. 100, Senator King quotes the letter of the Chairman of the Federal Trade Commission. Sen. Rep. 879, Part 2. A supplemental report of Representative Celler on H. R. 1611 mentions the non-signer clause. This report warned against the combination of pressure groups who were supporting this bill in order to secure higher prices. H. R. Rep. No. 382, 75th Cong., 1st Sess. (1937). *Cf.* Representative Celler's statement characterizing H. R. 1611 as a "coercive law . . . not either a fair trade law as written or a loss-leader law." Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 100, p. 5 (1937). See FTC Report on Resale Price Maintenance 60 (1945).

Congress as legislation to counteract the *Dr. Miles* case by authorizing resale price maintenance by contract. Representative Culkin, who spoke on the Capper-Kelly *and* Miller-Tydings bills, considered that their purposes were identical.[53]

As enacted, the language of the Miller-Tydings Amendment tracks the language of the Capper-Kelly bill. Before enactment, however, the Miller-Tydings bills contained a cryptic clause not present in the Capper-Kelly bills. This clause was deleted in H. R. 7472.

As introduced, S. 3822, S. 100 and H. R. 1611, would have legalized "contracts or agreement prescribing minimum prices *or other conditions*" for the resale of a commodity. The phrase *"or other conditions"* recalls the language of Justice Holmes' dissent in the *Dr. Miles* case in which he excluded from consideration any "attempt to attach a contract or condition to the goods . . . or in any way to restrict dealings with them after they leave the hands of the [contracting] retail men."[54] If this phrase had not been deleted, it might have been contended that these cryptic words authorized a restrictive condition or equitable covenant placed upon the use of the property.[55] Such an interpretation might have produced the effect of a non-signer clause. Whatever may have been intended by the phrase, the effect of the deletion was to conform the Miller-Tydings Amendment, as enacted, with the Capper-Kelly bill and with the contract clause of a typical fair trade law.

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[53] *Compare* 72 Cong. Rec. 9517 *with* 81 Cong. Rec. 8139-8140.
[54] 220 U. S. 373, 410-411 (1911).
[55] Chaffee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928); Beaudette and Berens, The Non-Signer Clause of Fair Trade Acts, 25 Notre Dame Law. 529, 541 (1950).

The deletion of the phrase "*or other conditions*" must be considered with another last minute amendment to the bill. This amendment added a proviso prohibiting horizontal resale price maintenance.[56] The effect of these two changes is to preclude enforcement of resale price maintenance contracts against non-signers. According to Senator Tydings, these changes obviated the objections of the administration to the Miller-Tydings bill as introduced.[57]

This carries the legislative history back, full circle, to the *Dr. Miles* case. As enacted into law, *without the phrase "or other conditions"*, the Miller-Tydings Amendment is simply the Capper-Kelly bill.

These are the central facts in the legislative history of the Miller-Tydings Amendment:

> (1) The Miller-Tydings Amendment is virtually identical with the Capper-Kelly bills, introduced to overcome the effect of the *Dr. Miles* case, prior to the existence of any state fair trade law;
>
> (2) The Miller-Tydings Amendment and the Capper-Kelly bill at the federal level are virtually identical with the contract clause of a typical fair trade law, but have no provision corresponding with the non-signer clause at the state level.

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[56] "The preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices . . . between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." But, by use of the non-signer clause it is possible to attain horizontal price-fixing control on entire level.

[57] ". . . The amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the administration and . . . I think I am now in a position to say that the original objections have been eliminated." 81 Cong. Rec. 7496.

These compelling facts speak for themselves. They prove a clear congressional intent to narrow the application of the Miller-Tydings Amendment to *contracts* prescribing resale prices. They negative the inference that this exception to the national policy of a competitive economy was intended to apply to resale price maintenance imposed on non-signers.

Promoters of price-fixing by so-called "fair trade" laws may have thought they got what they wanted when the Seventy-Fifth Congress enacted the Miller-Tydings Amendment. They did *not* get what they needed to force price-fixing under color of law on unwilling, non-contracting parties in transactions affecting interstate commerce.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Counsel for Petitioners.

CERTIFICATE.

This is to certify that copies of this Brief have been served on opposing counsel on this 19th day of March, 1951.

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APPENDICES.

APPENDIX A

PERTINENT STATUTES

Sherman Anti-Trust Act, as Amended by Miller-Tydings Amendment

Every contract, *combination in the form of trust or otherwise,* or conspiracy, in *restraint of trade* or commerce among the several States, or with foreign nations, is hereby declared to be illegal; *Provided,* That nothing contained in sections 1-7 [the Sherman Act] of this title shall render illegal, *contracts or agreements* prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements* of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, *and the making of such contracts or agreements,* shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further,* That the preceding proviso shall not make lawful *any contract or agreement,* providing for the establishment or maintenance of minimum resale prices on any commodity herein in-

volved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B

Louisiana Fair Trade Act

AN ACT.

To protect trade mark owners, distributors and the public against injurious and unecomonic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. *No contract* relating to the *sale* or *resale* of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the *producer or owner* of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the *buyer* will not *resell* such commomity except at the *price stipulated by the vendor.*

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, *resell* except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed *to contain or imply conditions* that such commodity *may be resold* without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Section 2. *Wilfully* and *knowingly* advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is *unfair competition* and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act." Approved by the Governor: June 26, 1936.

APPENDIX C.

CAPPER-KELLY BILL

H. R. 11, 71st Cong., 1st Sess. (1929).

A bill to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand, or name.

Section 1. No contract relating to the sale or resale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed unlawful as against the public policy of the United States or in restraint of interstate or foreign commerce or in violation of any statute of the United States by reason of any agreement contained in such contract—

(1) That the vendee will not resell such commodity except at the price stipulated by the vendor and/or

(2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or by such vendee.

Section 2. Any such agreement in a contract in respect to interstate or foreign commerce in any such commodity shall be deemed to contain the implied condition that such commodity may be resold without reference to such agreement—

(1) In closing out the owners stock for the purpose of discontinuing dealing in such commodity;

(2) With prominent notice to the public that such commodity is damaged or deteriorated in quality, if such is the case, or

(3) By a receiver, trustee, or other officer acting under the orders of any court.

Section 3. Nothing contained in this act shall be construed as legalizing any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. [Relates to jurisdiction of federal courts in enforcement actions].

Section 5. As used in this act—

(1) The term "producer" means grower, packer, maker, manufacturer, or publisher.

(2) The term "commodity" means any subject of commerce.

(3) [Defines "interstate or foreign commerce"].

APPENDIX D

A COMPARISON

Capper-Kelly Bill H. R. 11, 71st Cong., 1st Sess.	Miller-Tydings Bill S. 100, H. R. 1611, 75th Cong., 1st Sess.
"No *contract* relating to **the sale** or resale **of a commodity which bears (or the label or container of which bears) the trade mark, brand, or name of the producer** or owner **of such commodity, and which is in** fair **and open competition with commodities of the same general class produced by others,** shall be deemed unlawful by reason of any agreement contained in such contract—(1) That the vendee shall not resell such commodity except at the price stipulated by the vendor—and/or (2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or such vendee . . ."	"Nothing contained [in the Sherman Act] shall render illegal *contracts or agreements* prescribing minimum prices or other conditions for **the sale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer** or distributor **of such commodity, and which is in** free **and open competition with commodities of the same general class produced** or distributed **by others** when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia . . ."

APPENDIX E.

LEGISLATIVE BACKGROUND OF MILLER-TYDINGS AMENDMENT

I. Introduction.

The Miller-Tydings Amendment has a long legislative history extending far beyond the debates and reports of the Seventy-Fifth Congress which in 1937 enacted it as an amendment to the Sherman Act. The bill that became the Miller-Tydings Act is the last of a series of closely related bills that began with the Stevens bill in 1914.

Prior to the Sherman Act, this Court held that a resale price maintenance contract was not illegal as a common law restraint of trade. *Fowle v. Park*, 131 U. S. 88 (1889).[1] In 1911 the Court decided the *Dr. Miles* case, holding that the Sherman Act had modified, by statute, the rule of *Fowle v. Park*, and that a resale price maintenance contract was violative of the Sherman Act.[2] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911.)

[1] *Fowle v. Park* was restricted, in the *Dr. Miles* case, to being authority only for the doctrine that a secret process might be the subject of confidential communication and of sale or license to use with restrictions as to prices. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 402 (1911).

[2] Notwithstanding the Sherman Act, resale price maintenance has been permitted in restricted areas of the economy under the patent laws [*Bement v. National Harrow Co.*, 186 U. S. 70 (1902) ("licenses" under the patent laws); *United States v. General Electric Co.*, 272 U. S. 476 (1926) (patent licenses combined with agency-contracts)], but even in these restricted areas, the rights of the patentee are limited. [*Bauer v. O'Donnell*, 229 U. S. 1 (1913); *United States v. Ethyl Gasoline Corporation*, 309 U. S. 436 (1940)]. However, the copyright laws grant no such immunity. *Bobbs Merrill Co. v. Strauss*, 210 U. S. 339 (1910). A producer may "suggest" resale prices to his vendee [*Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208 (1921)] and may refuse to sell to those who fail to maintain resale prices [*United States v. Colgate*,

The *Dr. Miles* case aroused great interest. A vigorous dissent by Mr. Justice Holmes, expressing disagreement with the Court's reasoning, urged the validity of resale price maintenance *contracts*. The dissent phrased the question before the Court in the following language:

> "There [was] no attempt to attach a condition or conditions to the goods . . . The only question [was] whether the law forbids a purchaser to *contract* with his vendor that he will not sell below a certain price." [3]

That decision marks the beginning of attempts to obtain federal legislative sanction for resale price maintenance contracts. All proposed legislation relating to resale price maintenance in transactions affecting interstate commerce, beginning shortly after the *Dr. Miles* case in 1911 and terminating with the enactment of the Miller-Tydings Act in 1937, must be examined in light of this case.

II. The Capper-Kelly Bill.

In 1914,[4] the first federal bill legalizing resale price maintenance was introduced in the Sixty-Third Congress [5] by Representative Stevens of New Hampshire.

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250 U. S. 301 (1919)]. But when the refusal to sell is combined with an express or implied resale price maintenance contract, the manufacturer violates the antitrust laws. *United States v. Schrader's Sons*, 252 U. S. 85 (1920) (express contract held to be invalid under *Dr. Miles* case); *Federal Trade Commission v. Beech-Nut Packaging Co.*, 257 U. S. 441 (1922) (implied contract held to violate Federal Trade Commission Act).

[3] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 410 (1911).

[4] 54 Cong. Rec. 2377-8.

[5] H. R. 13305, 63d Cong., 2d and 3d Sess. (1914), introduced Feb. 12, 1914 by Representative Raymond B. Stevens of New Hampshire.

The proposed legislation was intended to avoid the *Dr. Miles* decision by authorizing contracts prescribing a "uniform price at which each article covered by such contract may be resold".[6] Under the provisions of this bill, any producer, grower, manufacturer, or owner of an identified article would be authorized to establish, by contract with the dealers, the resale price of the article when sold in interstate commerce.[7] The Stevens bill was not reported out of the House Committee.

In the Sixty-Fourth Congress, the Stephens bill,[8] similar to the Stevens bill of the preceding Congress, was introduced.[9] Although a hearing was held,[10] again the Congress failed to enact resale price maintenance legislation.

Thereafter, until 1933, sponsors of resale price maintenance introduced in each term of the Congress a version of the basic resale price maintenance known as the Kelly or the Capper-Kelly bill.[11] Although differing slightly from the two preceding bills, the purpose of these bills was identical: to overcome the effect of the *Dr. Miles* case by enacting legislation to

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[6] The avowed purpose of the bill was "to prevent discrimination in prices to dealers and to the public". Hearings before Committee on Interstate and Foreign Commerce on H. R. 13305, 63d Cong., 2d and 3d Sess. 3 (1914). See also the Metz bill, H. R. 13860, 63d Cong., 2d Sess. (1914), the purpose of which was "to prevent discrimination between different consumers and localities by establishing uniform prices for uniform commodities".

[7] FTC Report on Resale Price Maintenance, 40 (1945).

[8] H. R. 13568, 64th Cong., 1st Sess. (1916), introduced by Representative Dan B. Stephens of Nebraska.

[9] The purpose of the Stephens bill, according to its title, was "to protect the public against dishonest advertising and false pretenses in merchandising".

[10] Hearings before Committee on Interstate and Foreign Commerce on H. R. 16568, 64th Cong., 1st Sess. (1916).

[11] Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 42 (1949).

permit resale price maintenance by contract in interstate commerce.[12]

In the Sixty-Fifth, Sixty-Sixth, Sixty-Seventh, and Sixty-Eighth Congresses, the Kelly bill was introduced,[13] but no hearings were held and in each term the bill failed of passage. In the Sixty-Ninth Congress, Representative Kelly introduced a new version of the Kelly bill,[14] which differed in form but not in substance from the prior bills.[15] Although extensive hearings were held by the House Committee,[16] the Congress again failed to enact legislation to permit resale price maintenance by contract in interstate commerce. And again in the Seventieth Congress (1928), the Kelly bill failed of enactment.[17]

The Seventy-First Congress convened in 1929. In the first session, the Capper-Kelly fair trade bill[18] was

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[12] *Ibid.*; FTC Report on Resale Price Maintenance, 41 (1945).

[13] These bills, which were sponsored primarily by Representative Clyde Kelly of Pennsylvania, were designed, according to their titles, "to protect the public against false pretenses in merchandising under trade-mark or special brand of articles of standard quality". Hearings before Committee on Interstate and Foreign Commerce on H. R. 11, 69th Cong., 1st Sess. (1926).

[14] The caption of the bill was changed to read:

"A BILL TO clarify the law, to promote equality thereunder, to encourage competition in production and quality, to prevent injury to goodwill, and to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, name, or brand."

[15] FTC Report on Resale Price Maintenance, 41 (1945).

[16] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 11, 69th Cong., 1st Sess. (1926).

[17] The Kelly bill of the Seventieth Congress precipitated an examination by the Federal Trade Commission of the desirability of resale price maintenance. The purpose of the report was to investigate the effect of the proposed legislation on the consumer—"a comparatively inarticulate element of society". The Report, submitted to the Congress on January 30, 1929, opposed resale price maintenance. H. Doc. 546, 70th Cong., 2d Sess. (1929).

[18] Senator Capper indicates the bill was first labeled a "fair trade bill" in the Sixty-Ninth Congress, in 1925. 75 Cong. Rec. 14977. See also 76 Cong. Rec. 826. Senator Capper, in a letter to Representative Kelly dated Jan. 21, 1931, refers to the bill as the "Capper-Kelly fair trade bill". 74 Cong. Rec. 3009. In the House debate, Representative Kelly refers to his bill as a "fair trade" bill. 74 Cong. Rec. 3485.

introduced in the House and Senate.[19] As introduced, the bill provided:

> "That no contract relating to the sale or resale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed unlawful as against the public policy of the United States or in restraint of interstate or foreign commerce or in violation of any statute of the United States . . .. by reason of any agreement contained in such contract—
>
> (1) That the vendee will not resell such commodity except at the price stipulated by the vendor and/or
>
> (2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or by such vendee."[20]

No action was taken on the bill.[21] In the second session,[22] the House Interstate and Foreign Com-

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[19] S. 240, H. R. 11, 71st Cong., 1st Sess. (1929). Both bills bore the title:

"A bill to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand, or name."

[20] The balance of the bill parallels the original fair trade acts, without the non-signer clause. See Appendix C, where the bill is set forth in full.

[21] S. 240, to Senate Committee on Interstate Commerce. 71 Cong. Rec. 105. H. R. 11, to House Committee on Interstate Commerce. 71 Cong. Rec. 27.

[22] December 2, 1929 through July 3, 1930.

merce Committee reported [23] the Capper-Kelly bill favorably, with an amendment.[24]

This bill is important. It was the model for the first fair trade law, the California Act of 1931,[25] which has been called the *"Junior Capper-Kelly bill"*.[26] The Capper-Kelly bill contained no non-signer clause; nor did the California statute in 1931. Not until 1933 was the non-signer scheme devised. In that year the California Fair Trade Act was amended by the addition of a non-signer clause (Section 1½).

The purpose of the Capper-Kelly bill was the same as that of prior and subsequent proposed bills—to avoid the effect of the *Dr. Miles* case. This conclusion is apparent from the House Report[27] and the remarks on the House floor by Representative Francis D. Culkin of New York.[28]

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[23] H. R. Rep. 536, 71st Con., 2d Sess. (1930), submitted January 7, 1930. 72 Cong. Rec. 2487. Minority report filed February 1, 1930, 72 Cong. Rec. 2857.

[24] For Representative Kelly's supporting remarks, see 72 Cong. Rec. 325-332.

[25] The first section of the bill, as amended in committee, provided:

"That no contract relating to the sale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or trade name of the producer of such commodity, and which is in fair and open competition with commodities of the same general class, shall be deemed unlawful, as against the public policy of the United States, or in restraint of interstate or foreign commerce, or in violation of any statute of the United States, by reason of any agreement contained in such contract—That the vendee will not resell such commodity except at the price stipulated by the vendor." H. Rep. 536, 71st Cong., 2d Sess. 1 (1930). See also 74 Cong. Rec. 3533.

A comparison of the bill as introduced and the bill as amended, is available at 74 Cong. Rec. 3533, 3534.

[26] Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640, 641 (1936).

[27] H. R. Rep. 536, 71st Cong., 2d Sess., Part 2 (1930), *passim*.

[28] Mr. Culkin envisages the purpose of the legislation to be the writing into law of the dissent in the *Dr. Miles* case. 72 Cong. Rec. 9517.

In the third session of the Seventy-First Congress[29], Representative Kelly, in the debates on the floor of the House,[30] stated:

> "Up to that time [1911] any independent manufacturer could make an agreement with a distributor as to resale prices, but that right was taken away by a decision of the Supreme Court in the *Doctor Miles* case.[31]

He pointed out that the bill was designed "to restore a right which was universally held up until [the date of the *Dr. Miles* decision]."[32]

No sponsor of the bill, nor even its most articulate opponent,[33] ever suggested that the act conceivably could be used against any but parties to the contracts. At worst, it was envisaged that a manufacturer might obtain by coercion contracts from all parties, by use of his right to refuse to sell those wholesalers who would not require all retailers to execute such contracts.[34]

After considerable debate, the bill passed the House. When the bill went to the Senate, it was referred to the Committee on Interstate Commerce.[35] Senator Capper, co-author of the bill, spoke on its behalf,[36]

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[29] December 1, 1930 through March 4, 1931.
[30] See 74 Cong. Rec. 138-156, 358-361.
[31] *Id.*, at 361.
[32] *Id.*, at 361. For other statements to the same effect, see 74 Cong. Rec. 2398, 3485, 3527. In the earlier House debate, most members who discussed the bill conceded this effect. 74 Cong. Rec. 150 *et seq.* See also 74 Cong. Rec. 3483 *et seq.*
[33] Representative E. E. Cox of Georgia.
[34] 74 Cong. Rec. 2377-8.
[35] *Id.*, at 3629.
[36] *Id.*, at 3629.

but it died in the Committee when the Congress adjourned.[37]

When the Seventy-Second Congress convened for its first session,[38] the Capper-Kelly bill was introduced in the House and Senate.[39] The Senate Committee reported the bill "without recommendation" in a report entitled "Capper-Kelly Fair Trade Bill".[40] This report, like the House Report of the previous Congress, indicated the purpose of the bill to permit resale contracts held invalid in the *Dr. Miles* case.[41] Senator Capper made similar statements.[42] Although the bill was discussed in the Senate[43] the Senate failed to pass the measure. Nor, in this session of Congress, did the House take any action.

In the second session of the Seventy-Second Congress,[44] the Capper-Kelly bill was debated on the

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[37] Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640, 641 (1936).

[38] The first session extended from December 7, 1931 through July 7, 1932.

[39] H. R. 11, S. 97, 72d Cong., 1st Sess. (1932). The title was identical with the title of the same bill in the previous Congress. See footnote 19, *supra*. In the House, H. R. 11 was referred to the Committee on the Judiciary; in the Senate, S. 97 was referred to the Committee on Interstate Commerce.

[40] Sen. Rep. 441, 72d Cong., 1st Sess. (1932).

[41] *Id.*, at 4. The report states: "This bill only legalizes an agreement as to resale price between the vendor and vendee of an identified, standard product, which is in competition with other articles of the same class . . . This agreement was held legal in interstate commerce through a long series of decisions by Federal courts up to 1911, when it was ruled invalid by the Supreme Court in the Dr. Miles Medical Co. case."

[42] Senator Capper stated: "This measure . . . would restore the freedom of contract between manufacturer and merchant, a freedom taken away by a Supreme Court opinion several years ago . . ." 75 Cong. Rec. 14989 (1932). See also 76 Cong. Rec. 829. A similar statement was made by Senator Copeland, another proponent of the bill, who urged: "Let us respond to the need pointed out in the opinion of Mr. Justice Holmes in the Miles case. We can do this by passing . . . S. 97." 75 Cong. Rec. 14989.

[43] *Id.*, at 11713, 14976.

[44] December 5, 1932 through March 4, 1933.

floor of the Congress on several occasions.[45] In the House debate, it should be noted that the purpose of the bill was reiterated.[46] The Seventy-Second Congress adjourned without any further action being taken on the Capper-Kelly bill, and the bill thereby failed of enactment.

The adjournment of the Seventy-Second Congress marked the temporary cessation of activity on a national level by advocates of resale price maintenance.[47] Lack of pressure by proponents of fair trade was attributable to the fact that their objective had been attained otherwise. Soon after the Seventy-Third Congress convened, the National Industrial Recovery Act was enacted. Retail Codes of Fair Competition, adopted pursuant to its provisions, permitted resale price maintenance.[48]

Thus, from the date of the Dr. Miles case, advocates of resale price maintenance urged Congress to write into the law the dissenting opinion of Justice Holmes. But in no version of the Capper-Kelly bill or any other Congressional bill was the non-signer clause proposed.

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[45] 76 Cong. Rec. 482, 822, 826, 915, 919.

[46] For example, Representative Bulkley said: "By this measure [S. 97] it is proposed to restore to producers and distributors of trade-marked products the liberty of contract of which they were deprived in 1911 by . . . the Doctor Miles . . . case." 76 Cong. Rec. 482. See also the statement of Rep. Kelly, *Id.*, at 3569.

[47] In the Seventy-Third Congress, which convened on March 4, 1933, Senator Capper and Representative Kelly introduced further bills, entitled bills to define the intent of the antitrust laws as to certain agreements. See H. R. 3100, H. R. 3677, S. 299, S. 497, 73d Cong., 1st Sess. (1933). But no further action was taken.

[48] FTC Report on Resale Price Maintenance, 43 (1945).

III. The Miller-Tydings Bill.

A—Seventy-Fourth Congress—Second Session, S. 3822.

The appetite of advocates of resale price maintenance for guaranteed profit without competition had been "whetted"[49] under the N. R. A.'s Codes of Fair Competition.

The first attempt after the Capper-Kelly bill to obtain federal legislative sanction for resale price maintenance in transactions affecting interstate commerce was made in the second session of the Seventy-Fourth Congress. On January 27, 1936, Senator Tydings introduced Senate Bill No. 3822,[50] the first version of the bill which was to become known as the "Miller-Tydings bill". This bill was substantively identical with its predecessor, the Capper-Kelly bill. The differences in phraseology and format and these differences are minor[51]—derive from the different legislative approaches of the two bills. Unlike the Capper-Kelly bill, which was proposed as an independent statute to provide that resale price maintenance contracts should not be deemed violative of "any statute of the United States", the Miller-Tydings bill proposed directly to amend the Sherman Act.

Although this first version of the Miller-Tydings bill was similar in most respects to the Miller-Tydings Amend-

[49] Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 45 (1949).
[50] S. 3822, 74th Cong., 2d Sess. (1936). 80 Cong. Rec. 1007.
[51] See Appendix D.

ment, as enacted, the provisions were not identical.[52] After reference to the Senate Judiciary Committee, S. 3822 was reported favorably out of committee without amendment.[53] On June 1, 1936, the Senate passed the bill without amendment.[54] After the bill went to the House, it was referred to the House Judiciary Committee.[55] When the Congress adjourned nineteen days later, the House had received no committee report on the bill, and had taken no action.

Notwithstanding the failure of the Seventy-Fourth Congress to enact S. 3822, the striking similarity (indeed substantial identity)[56] between this bill and the Miller-Tydings bill, as introduced in the Seventy-Fifth Congress, makes Congressional comment upon this bill bear directly upon the interpretation of the Miller-Tydings Act, as enacted.[57]

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[52] The pertinent provisions of S. 3822, 74th Cong., 2d Sess., were:
". . . section 1 of the [Sherman] act . . . is amended [by adding the following proviso] . . .
"*Provided*, That nothing herein contained shall render illegal *contracts or agreements prescribing minimum prices or other conditions* for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer of such commodity, and which is in free and open competition with commodities of the same general class produced by others, when contracts or agreements of that description are lawful as applied to intrastate transactions." 80 Cong. Rec. 8433. The phrase "or other conditions", it should be noted, was not in the Capper-Kelly bill.

[53] Sen. Rep. 2053, 74th Cong., 2d Sess. (1936).

[54] 80 Cong. Rec. 8433.

[55] *Id.*, at 8871.

[56] As will be discussed subsequently, the Miller-Tydings act, as enacted, was derived almost entirely from H. R. 1611 and S. 100 (similar to H. R. 1611) of the 75th Cong., 1st Sess. The only differences between S. 3822 (74th Cong., 2d Sess.) and H. R. 1611 (75th Cong., 1st Sess.) was the addition in H. R. 1611 to the terms of S. 3822 of the phrases "or distributor" following the word "producer", and "or distributed", following the word "produced".

[57] The Senate Committee on the Judicial considered S. 100 (75th Cong., 1st Sess.) so similar to S. 3822 (74th Cong., 2d Sess.) that its Report (Sen. Rep. No. 257) on S. 100 quoted the entire report (Sen. Rep. No. 2053) on S. 3822. *Supra*, note 53.

At no time in the legislative consideration of S. 3822 was the non-signer clause mentioned. As a matter of fact, S. 3822 was presented to the Congress as a remedy for "loss-leader" sales, *i. e.*, sales in which products are sold below their cost in order to attract customers into the seller's store.[58] Its author, Senator Tydings, gave the following explanation of the bill on the Senate floor:

> ". . . this bill was reported unanimously from the Committee on the Judiciary after hearings were held. It grows out of the fact that 12 states—[states listed]—have all adopted acts within their states regulating loss-leader selling and *the making of contracts between a manufacturer and a distributor of an article.* This has been done in an effort to make trade equal and fair and to eliminate discrimination. After hearings, the Committee reported the bill unanimously and favorably. It simply backs up the action of those states which have already enacted valid laws which have been passed on by the courts."[59]

The explanation is oversimplified; for fair trade acts legalizing resale price-fixing have no necessary relation to loss-leader acts aimed at the predatory trade practice of selling below cost.[60]

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[58] 80 Cong. Rec. 8433. See also Sen. Rep. No. 2053, 74th Cong., 2d Sess., 2 (1936).

[59] 80 Cong. Rec. 133.

[60] Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 47-53 (1949). In transactions affecting interstate commerce, the anti-trust laws and actions by the Federal Trade Commission are fully capable of meeting this danger. Comment, *Sales Below Cost Prohibitions*, 57 Yale L. Jour. 391, 400 (1948). Most states have enacted loss leader statutes prohibiting sales below cost, plus a mark-up of 5% or 6%, which would preclude loss leader selling in purely intrastate transactions. *Ibid.* Louisiana has a "loss leader" statute, prohibiting sales below cost plus a mark-up of 6%, which has been held to be constitutional. La. Act 256 of 1946; Louisiana Wholesale Distributors Ass'n. v. Rosenzweig, 214 La. 1, 36 So. (2d) 406 (1948).

A more thorough and more exact explanation of the bill is contained in the Committee Report.[61] In commenting upon resale price maintenance in intrastate transactions, the Report states that a fair trade act authorizes

> "a manufacturer or producer of a commodity . . . to make a *contract* that the *purchaser* will not resell such commodity except at the price stipulated . . ."

The Report concludes that S. 3822 will alleviate these doubts:

> "S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing *such contracts* where legal under the laws of the State where made or where they are to be performed . . . . In other words, *the bill does no more than to remove Federal obstacles to the enforcement of contracts* which the states themselves have declared lawful."[62]

It should be noted that the Committee discussed S. 3822 as a means of legalizing *contracts* only, and makes particular mention of common law contracts for resale price maintenance—*equating* such contracts with the contracts made pursuant to fair trade laws.

B—Seventy-Fifth Congress—First Session, 1-S. 100, H. R. 1611.

On January 5, 1937, Mr. Miller introduced in the House H. R. 1611.[63] This bill was almost identical with the

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[61] Sen. Rep. No. 2053, 74th Cong., 2d Sess. (1936).

[62] Sen. Rep. 2053, 74th Cong., 2d Sess. (1936). This report is quoted verbatim in both Senate Reports made on the Miller-Tydings bill (S. 100) in the Seventy-Fifth Congress, in lieu of new reports. Sen. Rep. No. 257, Sen. Rep. No 879, 75th Cong. 1st Sess.

[63] H. R. 1611, 75th Cong., 1st Sess., was entitled "A bill to amend the act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies' approved July 2, 1890." 81 Cong. Rec. 34. Hereafter, unless otherwise noted, all footnote references are to reports, documents, and debates of the 75th Congress, First Session (1937).

version (S. 3822) of the previous Congress.[64] It was referred to the House Committee on the Judiciary.[65]

On the following day, Senator Tydings introduced in the Senate S. 100, which was referred to the Senate Committee on the Judiciary.[66] The committees reported the bills favorably.

The House Report on H. R. 1611[67] sets forth the basis of the Committee's recommendation:

> "The sole objective of the proposed legislation is to permit the public policy of States having fair-trade acts to operate with respect to interstate *contracts* for the resale of goods within those states. The fair-trade acts referred to legalize the maintenance, by *contract*, of resale prices of branded or trade-marked goods which are in free competition with goods of the same general class.
>
> "To accomplish this end, the reported bill amends Section 1 of the Sherman Anti-trust Act which declares every contract in restraint of trade illegal. The amendment adds a sentence to the section, in the nature of a limitation, to the effect, in substance, that

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[64] The pertinent provisions of H. R. 1611, were:
". . . section 1 of the [Sherman] act . . . is amended [by adding the following proviso] . . . Provided that nothing herein contained shall render illegal *contracts or agreements prescribing minimum prices or other conditions* for the sale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity, and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions . . . ." H. R. Rep. No. 382; 81 Cong. Rec. 2133.

[65] 81 Cong. Rec. 34.

[66] 81 Cong. Rec. 66. There were minor differences in phraseology between S. 100 and H. R. 1611.

[67] H. R. Rep. No. 382.

> nothing therein contained shall render illegal *contracts* prescribing minimum prices or other conditions for resale of branded or trade-marked goods when such *contracts* are lawful as to intrastate transactions under the State law of the State in which the resale is to be made. . . .
>
> "*In view of the decision of the Supreme Court in Dr. Miles Medical Co. v. Parker & Sons Co.* (220 U. S. 373), *and other cases, it is doubtful that such contracts are now valid in interstate commerce.*"

The Committee considered the amendment as legalizing only price maintenance *contracts* of the type which the *Dr. Miles* case had held to violate the Sherman Act. The entire tenor of this section of the Report is that the purpose of the amendment is to avoid the *Dr. Miles* decision and to legislate it out of existence by amending the Sherman Act to permit the type of contract held illegal in that decision—and nothing more. *The contract in that case did not purport to bind any parties other than contracting parties.* This, therefore, was the type of contract which the House Committee intended to validate.

A typical fair trade act (including a non-signer clause) is set forth in the Report, but there is no discussion of the non-signer clause.[68] *The fact that the Committee had knowledge of the non-signer clause of the fair-trade acts and did not extend the scope of H. R. 1611 to parallel the non-signer clause, clearly demonstrates that the Committee did not intend to approve this provision.*

[68] A supplemental report by Representative Celler, joined by Representative Ramsey, does make specific reference to the non-signer provision *of state laws.* H. R. Rep. 382, Part 2, 24.

The Senate Committee also reported S. 100 out favorably, with amendments.[69] The Report stated that since S. 100 was "similar" to S. 3822 of the Seventy-fourth Congress, second session, the Report on S. 3822 was applicable to this legislation (S. 100). The Report then incorporated and set forth in its entirety the Report of the previous Congress.[70]

After receipt of the respective committee reports, neither house of the Congress acted with respect to the Miller-Tydings bill. On April 27, 1937, the day on which Senate action on S. 100 was expected,[71] President Roosevelt addressed to the President of the Senate a letter in which he recommended that the possible effects of S. 100 be studied further.[72] Annexed to President Roosevelt's letter was a memorandum from the Chairman of the Federal Trade Commission detailing the Commission's objections to S. 100.[73] Other Administration objections had been voiced by the Department of Justice and the Department of Agriculture.

In his letter, the President stated:

> "My attention was called to S. 100, which would render legal certain *contracts* for the maintenance of resale prices now illegal under Federal law."

[69] Sen. Rep. No. 257.
[70] See footnote 52, *supra*.
[71] CCH Trade Regulation Service (9th ed.) V. 2, para. 7058.
[72] 81 Cong. Rec. 3838. See Sen. Misc. Doc. No. 58, being a letter dated April 24, 1937, by President Roosevelt to the President of the Senate, together with an enclosure.
[73] Sen. Misc. Doc. No. 58, the enclosure annexed to the President's letter, being a letter, dated April 14, 1937, by W. A. Ayers, Chairman of the Federal Trade Commission, addressed to President Roosevelt.

The President suggested that Congress authorize the Federal Trade Commission to bring down to date a 1929 study of resale price maintenance—a proposal upon which Congress failed to act.

The letter of Chairman Ayres of the Federal Trade Commission which was forwarded to the Senate as an enclosure to President Roosevelt's letter indicates that the Commission was hostile to federal sanction of any resale price maintenance. This letter did point out the non-signer provisions of state laws and indicate that this clause, *under the provisions of S. 100*, would be applicable to interstate transactions.[74] However, later in that same year, after adoption of the Miller-Tydings Amendment, the Federal Trade Commission apparently had changed its position as to the scope of the Amendment. Shortly after Congress enacted the Amendment, Chairman Ayres warned that the Sherman Act might still be invoked against resale price maintenance not within the restricted scope of the Amendment. He warned:

> "The Tydings-Miller Act gives Federal sanction only to contracts between individual producers and individual distributors. . . . . In such cases resale price maintenance enforceable by contract is permissible. . . . For deviations from this permissive and limited right allowed by the Tydings-Miller Act, . . . the antitrust laws still are available. . . ."[75]

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[74] Chairman Ayres stated:

"A peculiar feature of many of the state laws which would, under a recent decision of the Supreme Court . . . [the *Old Dearborn* case, 57 S. Ct. 147] . . . thus be made binding upon interstate commerce is that they require wholesalers and retailers to conform to the provisions of private resale price maintenance contracts to which they are not parties. . . ."

[75] Address by Chairman Ayres before the National Wholesale Druggists' Ass'n. Convention, Oct. 4, 1937. CCH Trade Regulation Service (9th Ed.), V. 2, Para. 7091.

After receipt of the President's letter, the Senate took no further action on S. 100 and the House similarly took no further action on H. R. 1611.[76]

2—H. R. 7472.

On June 10, 1937, there was introduced in the House H. R. 7472—"A bill to provide additional revenue for the District of Columbia and for other purposes."[77] This bill was favorably reported without amendment.[78] After debate upon the various features of the bill[79] and a summary of the bill by its author,[80] H. R. 7472 was finally passed, after considerable amendment,[81] on June 18, 1937.

When H. R. 7472 was referred to the Senate, it was sent to the Committee on the District of Columbia. In Committee, an unrelated rider was attached to H. R. 7472. This rider, which appeared as Title VIII of the bill, was the Miller-Tydings bill "to legalize resale price maintenance contracts".[82] The language of the rider was similar to that of S. 100, except for *one major difference*. While S. 100 (and H. R. 1611) had sought to legalize "contracts or agreement prescribing minimum prices *or other conditions* for the resale of a commodity", Title VIII of H. R. 7472 was amended to legalize only "contracts

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[76] *Id.*, at Para. 7058.
[77] 81 Cong. Rec. 5631.
[78] H. R. Rep. No. 1016.
[79] 81 Cong. Rec. 5667, 5689, 5896, 5905, 5946.
[80] *Id.*, at 5904, 5905.
[81] *Id.*, at 5984.
[82] CCH Trade Regulation Service (5th ed.), V. 2, para. 7058. The original Title VIII of H. R. 7472, as passed by the House, was a provision for a tax on business privilege in the District of Columbia. 1 Toulmin's Anti-Trust Laws (Anderson's ed. 1949) 228.

or agreements *prescribing minimum prices* for the resale or a commodity."[83]

On July 7, 1937, H. R. 7472 was reported from committee with amendments and a report submitted.[84] This Report, Sen. Rep. No. 879, stated:

> "Title VIII of the bill, as reported by your committee, includes a provision amending the anti-trust laws which incorporates the provisions of Senate Bill 100, which was reported from the Committee on the Judiciary on March 29, 1937. In reporting S. 100, the Committee on the Judiciary incorporated a report on a similar bill (S. 3822) which was made during the Seventy-Fourth Congress. That report, which is also applicable to S. 100 and to Title VIII of this bill, is as follows. . . ."

Here the Committee quoted in full the language of the previous Senate Report. The Committee did not comment upon the deletion of the phrase "or other conditions" from S. 100. In its quotation of the previous Senate Report, however, the Committee refers *only to contracts*, makes no reference to the "non-signer clause", and makes no effort to extend the language of S. 100 to parallel Section 2 (the non-signer clause) as well as Section 1, of the typical fair trade act.

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[83] The full text of the first proviso clause contained in H. R. 7472, Title VIII, read as follows when reported out of committee:

"Provided, that nothing herein contained shall render illegal *contracts or agreements prescribing minimum prices* for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as to intrastate transactions. . . ."

[84] Sen. Rep. No. 879.

Senator King submitted the views of the minority on H. R. 7472, and his views were printed as part 2 of Sen. Rep. No. 879. The minority strongly objected to attaching unrelated riders to legislation, and suggested that S. 100 be brought before the Senate on its merits alone. The minority report then sets forth the letters of the President and of the Chairman of the Federal Trade Commission,[85] discusses the economic arguments of the proponents of S. 100,[86] and refers to the possibility that the act will legalize price-fixing in interstate commerce.[87]

Senator Tydings explained on the floor:

"... I wish to make a very brief statement in explanation of the pending amendment.

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[85] See footnotes 72, 78, *supra*.

[86] Sen. Rep. No. 879, Part 2 (Minority Report), p. 8.

"My information is that the opponents of S. 100 have indicated a willingness to withdraw opposition to the same if an amendment were inserted in the proposed law that would in effect limit its provisions to prevent sales below cost. An amendment, as I am advised, was suggested that any resale price fixed under contracts, pursuant to the provisions of S. 100, shall not be higher than actual invoice cost to the seller. The contention was made that an amendment of this character would meet all legitimate requirements. I am further advised that it was proposed that the opponents of S. 100 were willing to support a 5-percent margin above invoice cost believing that this would definitely prevent loss-leader selling and at the same time guard against actual price fixing. The proposition was not, as I understand, acceptable and objection was made to an amendment . . . which conferred authority upon the Federal Trade Commission to exercise some supervision and control under provisions providing for fixed prices where such prices appeared unfair and unreasonable. . . ."

[87] Sen. Rep. No. 879, Part 2 (Minority Report), p. 6.

"And it should not be forgotten that these price contracts are not necessarily made with each wholesaler or retailer who resells the goods. The Supreme Court has always held valid, in the California and Illinois cases, the section of these State laws that allows the manufacturer or wholesaler by having only one contract in a state to force his fixed price on other dealers within the State by merely giving such other dealers notices of the contract. It may be asked why is it, with all these legal facilities already available in nearly all the states, that pressure for Federal legislation should be exerted."

"What does the amendment do? It *permits* a man who manufacturers an article to state the minimum resale price of the article *in a contract with the man* who buys it for ultimate resale to the public, provided —and this 'provided' is mountain high—that the article about which the contract is written is in free and open competition with other articles. . . ."[88]

Senator Tydings was fully cognizant of Administration objections to the original Miller-Tydings bills. As introduced, S. 3822, S. 100, and H. R. 1611 would have legalized "contracts or agreements prescribing minimum prices *or other conditions*" for the resale of a commodity. The phrase "or other conditions" recalls the language of Justice Holmes' dissent in the *Dr. Miles* case, in which he excluded from consideration any "attempt to attach a contract or condition to the goods . . . or in any way to restrict dealings with them after they leave the hands of the [contracting] retailmen."[89] If this phrase had not been deleted, it might have been contended that these cryptic words authorized a restrictive condition or equitable covenant upon the use of the property.[90] Whatever may have been intended by the phrase, the effect of the deletion was to conform the Miller-Tydings Amendment, as enacted, with the Capper-Kelly bill and with the contract clause of a typical fair trade law.

The deletion of the phrase "or other condition" must be considered with another last minute amendment to the

[88] 81 Cong. Rec. 7495.
[89] 220 U. S. 373, 410-411 (1911).
[90] Chaffee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928); Beaudette and Berens, The Non-Signer Clause of Fair Trade Acts, 25 Notre Dame Law. 529, 541 (1950).

bill. This amendment added a proviso prohibiting horizontal resale price maintenance. The effect of these two changes is to preclude enforcement of resale price maintenance against non-signers.[91] According to Senator Tydings these changes *obviated the Administration's objections to the original bill.* His first statement was not explicit on the subject of the administration's objections but he did say:

> ". . . I should like to say that the amendment which I have just offered [the second proviso clause] has been worked out by certain administration leaders and myself and is entirely satisfactory to me; and I think I am authorized to say that with that amendment the administration is not now opposed. . . ."[92]

The Senator's second statement on the removal of administration objections is explicit. He said:

> "Originally . . . there was a message from the administration in opposition to this measure. I may say that I have been in consultation with the Attorney General's office, and the amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the administration, and before I explain it briefly, I *think I am now in a position to say that* the original objections have been eliminated."[93]

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[91] This second proviso reads:

> *"Provided further,* that the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity, between manufacturers or between producers or between wholesalers or between retailers or between persons, firms, or corporations in competition with one another." 81 Cong. Rec. 7487.

[92] 81 Cong. Rec. 7487.

[93] *Id.*, at 7496.

On August 3, 1937, the conference report on H. R. 7472 was called up in the House. The report proposed that the House recede from its disagreement as to Title VIII which had been proposed as an amendment in the Senate committee. The House debate is of considerable interest.

The amendment of Title VIII bore the title "amendment 33" in the Conference Report, in which the House conferees recommended that the House recede from the disagreement on this amendment. The Conference Report contains the following statement on the part of the House conferees:

> "On amendment No. 33: This amendment to the antitrust laws under which *contracts or agreements* stipulating minimum resale prices of certain commodities, and which are similar to *contracts or agreements* which are lawful as applied to intrastate commerce, are not to be regarded as illegal under the antitrust laws. The House recedes."[94]

Making no reference to the non-signer clause and clearly restricting his interpretation of the bill to "contracts", Mr. Culkin stated:

> "The measure complements existing state law and *will make legal what was condemned by the Supreme Court in 1910 in the case of Dr. Miles Medical Co. v. Parks & Sons Co.*, (220 U. S. Rep. 373). The report of the proponent of the bill, Mr. Miller, calls attention to the opinion of Justice Sutherland [in the *Old Dearborn* case], upholding the constitutionality of the Illinois Price-Fixing Act. The House will be interested to know that such price-fixing acts supple-

[94] *Id.*, at 8137.

> mented by this legislation *will write into the law the minority opinion of Mr. Justice Holmes, filed in the Miles* case. Mr. Justice Holmes' language in this dissenting opinion was vigorous and incisive, and the principle laid down in his dissenting opinion is the genesis of this pending measure. . . ."[95]

Thus, Mr. Culkin, who, years before, had spoken on the Capper-Kelly bill, understood Title VIII of H. R. 7472 to permit only *contracts* fixing resale prices.

Representative McLaughlin did understand H. R. 1611, Mr. Miller's original bill, to incorporate the non-signer clause into federal law—perhaps because of the presence of the phrase "or other conditions" in H. R. 1611. He stated that adoption of the conference report would result

> ". . . in the enactment of the Miller-Tydings bill. That bill, H. R. 1611, has been acted on favorably by the Committee on the Judiciary and by the Rules Committee.
>
> "In these remarks, I shall refer to the Miller-Tydings amendment, which is included in the conference report, as H. R. 1611."[96]

But, *Mr. McLaughlin apparently was unaware that the phrase "or other conditions" contained in H. R. 1611 (and in S. 100) was deleted when S. 100 was substituted as Title VIII of H. R. 7472.* It might be assumed that since H. R. 1611 tracked section 1 of the typical fair trade act *except* for the phrase "or other conditions", this

[95] 81 Cong. Rec. 8139, 8140. Compare Mr. Culkin's statements quoted above on the Miller-Tydings bill with his statements on the Capper-Kelly bill. See footnote 28, *supra*. He envisages that the Miller-Tydings bill and the Capper-Kelly bill have the same purpose: to write into the law the *Dr. Miles* dissent.

[96] 81 Cong. Rec. 8140.

phrase might have had the purpose of incorporating federal sanction as to the non-signers covered in section 2 of the state fair trade acts. Deletion of the phrase from H. R. 1611 before incorporating that measure as Title VIII of H. R. 7472 is significant. The obvious significance, since the *deletion makes Title VIII conform almost exactly with Section 1, the contract provision, of the state acts,* is that the Committee desired specifically to limit Title VIII to exactly what it says—"contract or agreements relating to minimum prices".

Mr. McLaughlin's failure to note this deletion and his assumption of identity between H. R. 1611 and Title VIII of H. R. 7472 weakens considerably, to say the least, his statements regarding Title VIII. Assuming that his remarks could apply to H. R. 1611 or S. 100 as originally written, the remarks certainly cannot be applicable to Title VIII, in view of the deletion of the phrase "or other conditions". However, Mr. McLaughlin's remarks furnished one of the bases of decision in the only reported case examining the legislative history of the Miller-Tydings Act.[97]

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[97] Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (D. C. La. 1944), is the only reported decision, other than the decision in the Court of Appeals below, relating to the applicability of the Miller-Tydings Amendment to non-signers. The court did not consider the correlation existing between the Miller-Tydings Act and the Capper-Kelly bill, but restricted its examination of legislative history to the reports and debates of the Seventy-fifth Congress, and relied principally upon the statements of Mr. McLaughlin. After this rather restricted examination of legislative history, the court concluded:

"The history of the Amendment leaves no doubt that Congress enacted the Miller-Tydings Amendment with full knowledge of the provisions in State fair trade acts making resale price maintenance effective against non-contracting retailers."

This conclusion does not seem warranted, on the strength of statements by one or two members of Congress. However, even

In his discussion, Mr. McLaughlin made a statement wholly inconsistent with his later remarks concerning the non-signer clause.[98] He represented H. R. 1611 as a "permissive" act:

"H. R. 1611 . . . is entirely a *permissive* act. *It merely allows a seller and buyer of trade-*

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assuming the conclusion to be correct, it does not follow that the Miller-Tydings Act was intended to be applied to non-contracting retailers. It appears, instead, that Congress, with full knowledge of State fair trade laws, rejected the view that the Act should be made effective against non-contracting retailers.

[98] 81 Cong. Rec. 8142. Mr. McLaughlin's remarks on the non-signer were:

"House Bill 1611 is known as the Fair Trade Enabling Act because it is an act which enables fair-trade legislation passed by individual State legislatures to become effective and to be fully operative within the respective States. It is not legislation which puts into effect a new national policy originating in Congress. Rather it is legislation which helps the States to put into effect a policy originating within the States themselves. It constitutes a method through which States are enabled to enforce their laws through the cooperation of the Federal Government. It lends to the States the assistance of national legislation making effective fair-trade practice acts passed in the State legislatures. . . ."

"The State fair-trade practice acts in the respective States practically uniformly provide that any retailer selling a trade-marked commodity which comes within the provisions of act, knowing that the owner of the commodity has provided by contract that the article shall not be sold at less than a certain price, is bound by that contract although he may not be a party to it, and is liable for the penalties set up in the act against those who sell the trade-marked article at a price less than the price named as the selling price by the owner. . . .

"In the hearings before the committee and in the debates upon the bill in the committee itself, it was suggested that there are two points which may be considered in the nature of objections to the bill. The committee discussed these points and considered that they did not constitute valid objections. However, in order to present the matter fully to the House, these objections should be referred to. These objections are:

"First. That H. R. 1611, if enacted, would impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract to which he is not a party.

. . .

"The objections were overruled by the committee after a consideration of the testimony bearing upon them and after full discussion of the objections.

"The first objection, namely, that H. R. 1611, if enacted, will permit resale contracts to be binding upon parties other than the parties to the contract itself, is fully answered by the statement that the respective State laws make provision that the contract should be binding upon all those who sell the trade-marked article

marked or identified goods . . . to contract for resale of goods according to state law, if they want to do so. It does not compel the buyer and seller to enter a contract, but only authorizes them to do so, if they desire."

One might inquire as to the basically "permissive" nature of the Act. The non-contracting retailer who, under a state non-signer clause, may have had his rights bargained away by his competitor, in a contract to which he was not a party, would hardly consider the federal act "permissive" if it made a non-signer clause applicable to interstate transactions.

After further debate, the House adopted the Conference Report on H. R. 7472, including the recommendation of the House conferees to recede from disagreement on amendment No. 33—the Senate addition of Title VIII.[99] The bill was submitted to the Senate, which agreed to the Senate conferees recommendations on August 4, 1937. Thereafter H. R. 7472, as amended, was submitted to the President, who signed the bill on August 17, 1937.[100] Title VIII of H. R. 7472 became law, thereby amending the Sherman Act and Section 5 of the Federal Trade Commission Act.[101]

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which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly. This argument is well answered by the controlling opinion of the Supreme Court of the United States in the case of Old Dearborn against Seagram, supra, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act.

"Further complete answer to this objection is that the respective States in the exercise of their wisdom and judgment imposed the penalties provided in the respective State acts. The bill before us today, if enacted, merely makes effective the law which has been enacted by the respective State legislatures to govern transactions within their own borders."

[99] 81 Cong. Rec. 8143.
[100] *Id.*, at 8166.
[101] *Id.*, at 8477.

IV.

CONCLUSION.

The Miller-Tydings Act is closely linked with the original Stevens bill introduced in 1914, the Stephens bill of 1916, the Kelly and the Capper-Kelly bill introduced in each Congress from 1917 until 1933. All were motivated by the desire to remove the taint of illegality attached to resale price maintenance contracts by the *Dr. Miles* case. In the later bills, particularly the Capper-Kelly bill, explicit statements by the authors, by the Congressional committees considering these bills, and by many of the proponents of the bills, concede this purpose.

An hiatus exists from 1933 through 1935, during which no resale price maintenance bills were introduced in the Congress because resale price maintenance was permitted under the retail codes adopted pursuant to the N. R. A. On each side of the hiatus, however, substantially identical resale price maintenance legislation was proposed. The Capper-Kelly bill of the Seventy-First and Seventy-Second Congresses (Appendix C) is almost identical, word for word, with the Miller-Tydings Amendment as enacted (Appendix A). The necessary inference to be drawn from the similarity between the Capper-Kelly bill and the Miller-Tydings Amendment is that the latter was designed also to obviate the *Dr. Miles* decision and to write into the law the dissenting opinion in that case.

The Capper-Kelly bill, in addition to furnishing the basis for the Miller-Tydings Amendment at the federal level, also formed a basis for resale price maintenance bills adopted at the *state level.* The original state fair trade act, adopted in California in 1931, was based upon the Capper-Kelly bill. The California act has even been termed the "Junior Capper-Kelly Bill". This original California bill had no reference to non-signers, and no non-signer statutory provision appeared at the state level until the adoption in 1933 of the first non-signer clause. Such a provision has never appeared in any proposed federal legislation.

The basic facts in the legislative background of the Miller-Tydings Act are these:

(1) The Miller-Tydings Act is substantially identical in language and purpose with the Capper-Kelly bill drafted before the appearance of the first non-signer clause.

(2) The Capper-Kelly bill furnished the basis for the original California fair trade act (i.e., without the non-signer clause).

(3) The non-signer clause in state fair trade acts finds no basis in any proposed federal resale price maintenance bills, and furnished no basis for any such provision in the federal resale price maintenance legislation.

The legislative history proves beyond a doubt that the Miller-Tydings Amendment had a limited purpose: to except from the Sherman Act not all resale price maintenance—but only resale price maintenance by contracts, as permitted under the contract clause (Section 1) of a typical fair trade Act.

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